91-889

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

FRANK MCCOY, EDWARD ERDELATZ and PIERRE MERLE,
Petitioners,

VS.

THE HEARST CORPORATION, A California Corporation,
SAN FRANCISCO EXAMINER, RAUL RAMIREZ
and LOWELL BERGMAN,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

CHARLES O. MORGAN, JR.
450 Sansome Street, Suite 1310
San Francisco, CA 94111-3382
Telephone: (415) 392-2037
Counsel for Petitioners

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTIONS PRESENTED

1. Whether, under the First Amendment, a court independently reviewing a jury verdict in favor of a public figure libel plaintiff may refuse to draw all inferences in favor of the plaintiff, and may reverse the verdict on the basis of testimony rejected by the jury.

2. Whether a plaintiff is entitled, as a matter of federal constitutional right, to the independent review enunciated by this Court in *New York Times Co. v. Sullivan, Bose Corp. v. Consumers Union,* and *Harte-Hanks Communications, Inc. v. Connaughton,* of a libel verdict in his favor.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

The petitioners Frank McCoy, Edward Erdelatz and Pierre Merle respectfully pray that a writ of certiorari issue to review the judgment and order of the First District Court of Appeal, Division Five, of the State of California, entered in the above-entitled proceeding on June 10, 1991.

OPINIONS BELOW

The order of the California Court of Appeal, First Appellant District, Division Five, dated June 10, 1991 has not been reported. It appears in Appendix A hereto. The order of the California Supreme Court denying review, dated August 28, 1991, has not been reported. It appears in Appendix B.

Petitioners previously petitioned this Court for a Writ of Certiorari to the California Supreme Court. The order of this

Court denying the petition, dated May 4, 1987 is reported at 481 U.S. 1041, 95 L. Ed. 2d 822, 107 S.Ct. 1983, and appears in Appendix C. The opinion of the California Supreme Court, dated November 13, 1986, from which the certiorari petition was made, is reported at 42 Cal. 3d 835, 231 Cal. Rptr. 518, 727 P. 2d 711, and appears in Appendix D. The opinion of the California Court of Appeal, dated October 23, 1985, which had been vacated by the California Supreme Court, is reported at 174 Cal. App. 3d 892, 2320 Cal. Rptr 848, and appears in Appendix E.

The most recent opinion of the California Court of Appeal, dated March 1, 1991, is reported at 227 Cal. App. 3d 1657, 278 Cal. Rptr 596, and appears in Appendix F. The order of the California Supreme Cout denying review of that opinion, dated May 30, 1991, has not been reported. it appears in Appendix G.

JURISDICTION

The order of the California Supreme Court denying review was rendered on August 28, 1991. The petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. sec. 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article VI, Clause II:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the

people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment XIV:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of laws; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioners base their unusual second petition to this Court on the Court's decision in *Harte-Hanks Communications, Inc. v. Connaughton,* 491 U.S. 657 (1989), which demonstrated that the California Supreme Court violated their constitutional right of independent review when it reversed a judgment in their favor which had been entered following a jury trial.

On May 19, 20 and 21, 1976, the San Francisco Examiner published a series of articles written by Raul Ramirez with the assistance of Lowell Bergman. The articles dealt with the prosecution and conviction of Richard Lee for the 1972 murder of Poole Leong, which was the product of serious youth gang violence in San Francisco's Chinatown. Petitioners Erdelatz and McCoy were homicide inspectors assigned to the case, and petitioner Merle was the assistant district attorney responsible for the trial.

The articles charged that the three petitioners obtained Lee's conviction by threatening and intimidating witnesses, fabricating evidence and suborning the perjury of a key witness in the case—Thomas Porter.

The articles were false. The defendants neither offered evidence that the articles were true nor contested the falsity of the defamatory allegations in them. In contrast, all three petitioners and Porter testified that there were no threats, no beatings and no

attempts to create or fabricate testimony. (R.T. 640:16-20, 976:15-20; 982:10-15; 984:10-15; 3173:19-3179:6; 3455:27-3456:25).

At trial, the petitioners did not contest their status as "public officials." Consequently, the jury was instructed that petitioners could not prevail unless they demonstrated by clear and convincing evidence that the libelous articles were published by defendants with knowledge of their falsity or with a reckless disregard of their truth or falsity or with a reckless disregard of their truth or falsity. (R.T. 4709:17-21; 4710:9-17). The jury returned a verdict in favor of the petitioners.

Motions for a new trial and judgment notwithstanding the verdict was denied. While the appeal was pending, this Court issued its decision in *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 466 U.S. 485 (1984). All parties briefed the question of *Bose's* applicability to this case. The Court of Appeal, following *Bose,* found the case to be a "textbook case of libel," App. E at E-38, and affirmed the judgment.

The Supreme Court of California granted a petition for review. It decided that under *Bose,* discredited testimony rejected by the jury could be "salvag[ed] from the heap of disbelief" and reinterpreted. (App. D at D-7). Departing from the "usual confines of appellate review," (App. D at D-8), the California Supreme Court held (App. D at D-9):

> "This court is not bound to consider the evidence of actual malice in the light most favorable to respondents or to draw all permissible inferences in favor of respondents."
>
> In fact, the California Supreme Court stated that it could and would "substitute its own inferences on the issue of actual malice for those drawn by the trier of fact." (App. D at D-9).
>
> "Indeed, in *Bose* the court specifically *rejected* inferences drawn by the district court regarding Seligson's testimony on the issue of actual malice including the finding that his testimony on this issue was not credible."

(App. A at A-7 (emphasis in original).

Applying these principles, the California Supreme Court reversed the judgment of the Court of Appeal.

Petitioners timely petitioned this Court for writ of certiorari to the California Supreme Court, which was denied on May 4, 1987. (App. C). The California Court of Appeal on December 29, 1986, issued its remittitur directing the trial Court to reverse its judgment.

Because the California Supreme Court ordered a general reversal without specifically ordering that judgment be entered for defendants, petitioners moved to set the case for retrial pursuant to the state authority of *Erlin v. National Union Fire Ins. Co.* (1936) 7 Cal. 2d 547, 549, 61 P. 2d 756 (unqualified reversal remands case for new trial). Defendants moved for a judgment on the pleadings which was ultimately granted. The dismissal and judgment were appealed, and on March 1, 1991 the Court of Appeal affirmed the judgment of the Trial Court. (App. B). Petitioners thereafter filed a Petiton for Review to the California Supreme Court, which was denied on May 30, 1991. (App. G).

Following the filing of the Petition for Review, petitioners filed a Motion to Recall Remittitur in the original case on appeal, No. A011833, on the federal constitutional grounds that the California Supreme Court in directing issuance of the remittitur had violated petitioners' constitutional right of independent review as set forth in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), *Bose Corp. v. Consumers Union of U.S., Inc.* 466 U.S. 485 (1984), and *Harte-Hanks*.

By order dated June 10, 1991, the Court of Appeal denied the motion without comment and, on August 28, 1991 the California Supreme Court declined to review the order. (App. A & bB).

REASON FOR GRANTING THE WRIT

CALIFORNIA LAW DEPRIVES PETITIONERS OF CONSTITUTIONAL, INDEPENDENT REVIEW AND CONFLICTS WITH DECISIONS OF THIS COURT AND NINTH CIRCUIT

In refusing to recall a remittitur issued after an erroneous and blatantly unconstitutional review of a jury verdict, the California courts have perpetuated a dangerous conflict with the Ninth Circuit Court of Appeals and with this Court. As Justice King of the First District Court of Appeal wrote in his concurring opinion urging the California Supreme Court to grant review on the state ground:

> In its prior opinion, the California Supreme Court misread a piviotal United States Supreme Court decision, *Bose Corp. v. Consumers Union of U.S. Inc.* (1984) 466 U.S. 485, 512-513 . . . and consequently misinterpreted the standard of independent review in First Amendment libel cases.
>
> The trial court in *Bose* had determined that certain testimony as to lack of malice was not credible. In its *McCoy* opinion, the California Supreme Court stated that in *Bose* the United States Supreme Court rejected the trial court's credibility determination. (*McCoy v. Hearst Corp.* (1986) 42 Cal. 3d 853, 844 [231 Cal. Rptr. 518, 727 P.2d 711].)
>
> Subsequently, however, in *Harte-Hanks, Inc. v. Connaughton* (1989) 491 U.S. 657, 689 fn. 35, the United States Supreme Court repudiated this interpretation of *Bose*. The petitioner in *Harte-Hanks* had argued, as the California Supreme Court stated in *McCoy*, that the *Bose* decision had rejected the trial court's credibility determination. The *Harte-Hanks* opinion disapproved this interpretation of *Bose*, explaining that in *Bose* the court had actually accepted the trial court's credibility determination but had been unwilling to infer actual malice. . . .
>
> The California Supreme Court's erroneous reading of *Bose* was apparently critical to its decision. The court said, "Both the principles announced in *Bose* and *the manner in which*

> *the high court carried out its functions of independent review,* are the guide to be followed in reviewing the evidence at hand." (*McCoy v. Hearst Corp., Supra,* 42 Cal.3d at p. 845, italics added.) Had the California Supreme Court correctly interpreted *Bose* and applied the standard of independent appellate review with due deference to trial court credibility determinations, it might well have affirmed the judgment.
>
> App. F at F- (King J., concurring) (emphasis in original)

The California Supreme Court has, however, refused to review the lower court's decisions not to reset the case for trial (App. B) and not to recall the remittitur (App. G). That Court's failure gives this Court an opportunity both to correct an injustice done to the petitioners and, more importantly, to bring California's standard of review in libel cases in line with the Constitution and with prevailing caselaw.

As Justice King noted in his concurring opinion, *Harte-Hanks Communications, Inc. v. Connaughton,* 491 U.S. 657 (1989) demonstrated that the California Supreme Court had completely misunderstood this Court's holding in *Bose.* A reviewing court cannot simply disregard the factfinder's credibility determinations, though it may determine that actual malice could not reasonably be inferred from the facts. *Harte-Hanks,* 491 U.S. at 689 n. 35. By openly rejecting the credibility determinations of the jury, and by refusing to consider evidence in the light most favorable to petitioners or to draw all reasonable inferences in their favor, (App. D at D-7—D-9), the California Supreme Court unconstitutionally interfered with petitioners' rights of due process at trial and acted in excess of its jurisdiction.

The California courts' refusal to recall the remittitur perpetuates this denial of petitioners' constitutional rights. Under California law, though a mere error of law does not authorize a recall of the remittitur, an exception is made "where the error is of such dimensions as to entitle the defendants to a writ of habeas corpus." *People v. Mutch* (1971) 4 Cal. 3d 389, 396-7. Habeas corpus, of course, is a "method of review of judicial acts without or in excess of jurisdiction [and] is available only where the judgment or order has placed the petitioner in *custody.*" Certio-

rari also reviews "jurisdictional defects" and the scope of review is the same as in habeas corpus. (8 Witkin, *California Procedure,* 3rd Edition, Extraordinary Writs, § 14, p. 653 and § 10, p. 648) Thus, when an error is of such contitutional dimension as to entitle one to a writ of certiorari or habeas corpus, the remedy of recall of the remittitur should be granted. *People v. Valenzuela* (1985) 175 Cal. App. 3d 381, 388.

> For purposes of this writ as well as prohibition or certiorari, the term 'jurisdiction' is not limited to its fundamental meaning, and in such proceedings judicial acts may be restrained or annulled if determined to be in excess of the court's powers as defined by Constitutional provision, statute, or rules developed by court . . .
>
> *In re: Brown* (1973) 9 Cal. 3d 612, 624.

By virtue of the Supremacy clause of the United States Constitution, Article VI, Clause II, California courts are bound by the decisions of the United States Supreme Court and its construction of federal constitutional rights and are constrained to follow those decisions. *Calderon v. City of Los Angeles* (1971) 4 Cal. 3d 251, 258; *People v. Johnson* (1984) 162 Cal. App. 3d 1003, 1009; *Scott v. Meese* (1985) 174 Cal. App. 3d 249, 156-7.

The Ninth Circuit has properly applied a standard of review that conflicts sharply with what the California Supreme Court has established as California law. In *Guam Federation of Teachers v. Ysrael,* 492 F. 2d 438, 441 (9th Cir. 1974), *Alioto v. Cowles Communications, Inc.,* 519 F. 2d 777, 780 (9th Cir. 1975), and *Maheu v. Hughes Tool Co.,* 569 F. 2d 459, 464-65 (9th Cir. 1977), the Ninth Circuit established a method of independent review fully consistent with this Court's rulings:

> "A district judge on motion for judgment n.o.v., or an appellate judge on review, must examine the evidence to see whether, if all permissible inferences were drawn in the plaintiff's favor and all questions of credibility were resolved in his behalf, the evidence than would demonstrate by clear and convincing proof that the libelous material was published with actual malice. Once this question has been resolved in

> the plaintiff's favor, the jury's findings as to those inferences ands as to witness credibility are determinative."
>
> *Alioto,* 519 F. 2d at 780.

On the first day of its current term, this Court denied a petition for certiorari to the Ninth Circuit in *Newton v. National Broadcasting Co.,* 930 F.2d 662, *cert. denied* 112 S.Ct. 192 (1991). In *Newton,* the Ninth Circuit had once again acknowledged that it was not conducting a "de novo" review, 930 F.2d at 670 n. 10, and that the factfinder's factual determinations were entitled to a "presumption of correctness." *Newton,* 930 F.2d at 670. The Court determined that the presumption carried "maximum force" when applied to credibility determinations, but applies with less force when a factfinder's findings rely on the weighing of evidence and drawing of inferences. *Newton,* 930 F.2d at 671.

Newton therefore adopted a two-tiered review process "with a line drawn between highly deferential review of credibility determination and less deferential review of the factfinder's evaluation of other evidence relevant to the actual malice issue." 930 F.2d at 672. Although *Bose* and *Harte-Hanks* do not provide clear support for such an approach, the Ninth Circuit did not actually intrude on the factfinder's role. *Newton,* 930 F.2d at 981-85.

The California Supreme Court, however, gave no deference to credibility determinations or inferences drawn by the trier of facts and, in contrast to *Harte-Hanks,* 491 U.S. at 690-91 and *Newton,* 930 F.2d at 683 n. 41, rejected facts which the jury "must have" found in deciding to reverse the judgment. See *Harte-Hanks,* 491 U.S. at 697-700 (Scalia, J., concurring in judgment).

It is this much more intrusive review, entirely disrespectful of the jury's role in American justice, that this Court must not countenance. The scope of appellate review in libel cases, an issue that has caused confusion among the courts since *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964) requires further clarification by this Court to ensure that juries will not become superfluous to the outcome of public figure libel suits.

The First Amendment requires reviewing Courts to conduct independent review in order to ensure a constitutional result, but

the California Supreme Court's interpretation of that independent review is contrary to the First Amendment, allowing defendants to evade responsibility even though a jury's determination of the evidence compels a finding of liability. This is contrary to this Court's prior rulings on the First Amendment, which acknowledge that liability should be imposed to discourage publication of "erroneous material known to be or probably false." *Herbert v. Lando* 441 U.S. 153, 172 (1979).

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the First District Court of Appeal of the State of California.

CHARLES O. MORGAN, JR.
Counsel for Petitioner

Appendix A

Court of Appeal of the State of California

in and for the

First Appellate District

Division Five

Frank McCoy, et al.,
Plaintiffs and Appellants,

vs.

The Hearst Corporation, etc. et al.,
Defendants and Respondents.

[Filed June 10, 1991]

No. A011833

Superior Court Nos. 714-677
714-678
714-679

By this Court:

Appellant's motion to recall remittitur is denied.

Dated: June 10, 1991

LOW, P.J.

Appendix B

First Appellate District, Division Five, No. A011833

S021598

In the Supreme Court of the State of California

In Bank

Frank McCoy, et al.,
Appellants,

vs.

The Hearst Corporation, etc. et al.,
Respondents.

Appellant's petition for review denied.

Panelli, J. did not participate.

LUCAS
Chief Justice

Appendix C

No. 86-1336. Frank McCoy, Edward Erdelatz and Pierre Merle, Petitioners v. Hearst Corporation, et al.

481 US 1041, 95 L Ed 2d 822, 107 S Ct 1983.

May 4, 1987. Petition for writ of certiorari to the Supreme Court of California denied. Justice White would grant certiorari.

Same case below, 42 Cal 3d 835, 231 Cal Rptr 518, 727 P2d 711.

Appendix D

[S.F. No. 24967, Nov. 13, 1986.]

Frank McCoy et al.,
Plaintiffs and Respondents,
v.
Hearst Corporation et al.,
Defendants and Appellants.

Opinion

BIRD, C. J.—Do the First Amendment to the United States Constitution and California Constitution article I, section 2, protect two reporters and a newspaper against a libel judgment when they obtained and published a prisoner's affidavit containing allegations of official misconduct on the part of two police inspectors and a prosecutor?

I.

A suit for libel was brought against the Hearst Corporation, which owns the San Francisco Examiner (hereafter Examiner), and two reporters, Raul Ramirez and Lowell Bergman, by respondents, San Francisco Police Inspectors Frank McCoy and Edward Erdelatz, Jr., and former Assistant District Attorney Pierre Merle. The jury returned a vedict in favor of respondents in the sum of $4,560,000. The Court of Appeal affirmed the judgment.

Respondents complained they were libeled by a series of articles published in the Examiner on May 19, 20 and 21, 1976, written by Raul Ramirez with the assistance of Lowell Bergman. The articles purported to expose the wrongful conviction of Richard Lee for the 1972 San Francisco Chinatown killing of Poole Leong. According to the Examiner, Lee's conviction was obtained as a result of respondents' misconduct involving the state's key witness, Thomas Porter.[1]

The centerpiece of the articles, and the basis of respondents' libel claim, was the affidavit of Thomas Porter. This affidavit was reprinted in part in the last article and mentioned in the two

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[1] The articles are appended hereto as Appendices A through C.

previous articles. Porter, Richard Lee's cellmate prior to trial, originally testified at Lee's trial that Lee had confessed the Leong killing to him. However, the Examiner reported that Porter had not only declared this testimony false in a sworn affidavit, but also had charged that respondents procured his trial testimony by threats, coercion, physical assault and promises of leniency. Porter additionally alleged that respondent Merle, who prosecuted the Lee case, provided him with a written story which he memorized with Merle's help and delivered as testimony at the Lee trial.

The article of May 21st also claimed that a State Bar panel had recommended sanctions be taken against respondent Merle for "alleged misconduct" in relation to another Chinatown case.

Shortly after the articles appeared, Attorney Roger Ruffin filed a petition for writ of habeas corpus in superior court on behalf of Richard Lee. The petition alleged that Lee was innocent and that his conviction was based on false and unreliable evidence. Porter's affidavit[2] was attached as an exhibit in support of the petition, along with declarations from two eyewitnesses to the Leong killing, May Tom and Weyman Tso.

In response to the habeas corpus petition, investigators from the Attorney General's office located Porter in a halfway house in Wichita, Kansas, and obtained a second affidavit from him on July 22, 1976. In this affidavit, Porter attested that his previous affidavit was false. He signed it, he said, because he was upset at the treatment he had received from the California parole board. Porter denied he had been threatened or forced by anyone to give testimony at the Lee trial, or that any promises had been made to him in exchange for that testimony.

II.

In the landmark decision of *New York Times Co. v. Sullivan* (1964) 376 U.S. 254 [11 L.Ed.2d 686, 84 S.Ct. 710, 95 A.L.R.2d 1412], the Supreme Court held that a public official may not recover damages for a defamatory falsehood relating to official

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[2] The full text of Porter's affidavit is appended hereto as Appendix D.

conduct unless it is proved "that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false of not." (*Id.*, at pp. 279-280 [11 L.Ed.2d at p. 706].)[3] The high court further declared that in order to ensure that the libel judgment does not run afoul of constitutional principles, it must *independently examine* the statements in issue and the circumstances under which they were made against the backdrop of the whole record. (*Id.*, at p. 285 [11 L.Ed.2d at p. 709].)

Recently, in *Bose Corp. v. Consumers Union of U.S., Inc.* (1984) 466 U.S. 485 [80 L.Ed.2d 502, 104 S.Ct. 1949], the court strongly reaffirmed the principle of independent review. "The requirement of independent appellate review reiterated in *New York Times Co. v. Sullivan* is a rule of federal constitutional law. . . . It reflects a deeply held conviction that judges—and particularly Members of this Court—must exercise such review in order to preserve the precious liberties established and ordained by the Constitution. The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection *is not merely a question for the trier of fact.* Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.' " (*Id.*, at pp. 510-511 [80 L.Ed.2d at p. 523], italics added.)

Bose makes plain that in cases involving the constitutional rule of *New York Times*, those facts that are germane to the central question of actual malice must be sorted out and reviewed de novo, independently of any previous determinations by the trier of

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[3] Respondents concede they are public officials within the *New York Times* rule. (See *Gomes v. Fried* (1982) 136 Cal.App.3d 924, 932-934 [186 Cal.Rptr. 605] [police officers are "public officials"]; *Rosenblatt v. Baer* (1966) 383 U.S. 75, 85 [15 L.Ed.2d 597, 605, 86 S.Ct. 669] [". . . 'public official' designation applies at the very least to those . . . government employees who have . . . substantial responsibility for or control over the conduct of governmental affairs. (Fn. omitted.)"].)

fact. (*Bose, supra,* 466 U.S. at pp. 505-514 [80 L.Ed.2d at pp. 519-526].) " 'The simple fact is that First Amendment questions of "constitutional fact" compel this Court's *de novo* review. [Citations.]' " (*Id.,* at p. 509, fn. 27 [80 L.Ed.2d at p. 522], quoting *Rosenbloom v. Metromedia* (1971) 403 U.S. 29, 54 [29 L.Ed.2d 296, 318, 91 S.Ct. 1811] (plur. opn. of Brennan, J.); accord *Frankson v. Design Space Intern.* (Minn.App. 1986) 380 N.W.2d 560, 570 (conc. opn. of Foley, J.) [*Bose* gives appellate court power to conduct de novo review]; *Thompson v. Thompson* (1986) 110 Idaho 93 [714 P.2d 62, 64] [citing *Bose* for the proposition that constitutionally protected interests such as freedom of speech require appellate courts to conduct "free review" of constitutional facts].) Thus, this court must make an independent assessment of the entire record, but only as it pertains to actual malice. Issues apart from this constitutional question need not be reviewed de novo and are subject to the usual rules of appellate review. (*Bose, supra,* 466 U.S. at p. 514, fn. 31 [80 L.Ed.2d at p. 526].)

Bose involved an allegedly libelous article in Consumer Reports critiquing the sound path of the Bose 901 loudspeaker system. The article asserted that the sound tended to wander "about the room." (*Bose, supra,* 466 U.S. at pp. 487-488 [80 L.Ed.2d at p. 509].) The federal district court as trier of fact found that this phrase was a false and disparaging statement of fact since the listeners in the sound test, which was the basis of the article, reported instead that there was sound movement "along the wall" between the two speakers. (*Id.,* at pp. 490-491, 494 [80 L.Ed. 2d at pp. 510, 513].)

Engineer Arnold Seligson, a Consumers Union employee, supervised the listeners' sound test and interpreted its results in an in-house report. The district court found Seligson's report to be the source of actual malice. In its written findings, the court evaluated Seligson's credibility as a witness and his state of mind when he wrote the report. It concluded that Seligson had knowingly reported a false statement about the speakers' sound movement, and therefore, wrote with actual malice. In making this determination, the district court flatly rejected Seligson's testimony that the two phrases "about the room" and "along the wall"

meant about the same thing and expressly found that Seligson's testimony to this effect was not credible. (*Bose, supra,* 466 U.S. at 494-497 [80 L.Ed.2d at pp. 512-514].)

The court of appeals reversed on the ground that the record could not sustain a finding of actual malice. The court ruled that it must review the actual malice determination de novo and that it was not restricted by the "clearly erroneous," standard of rule 52(a) of the Federal Rules of Civil Procedure (hereafter rule 52(a)). (See *Bose supra,* 466 U.S. at pp. 491-492 [80 L.Ed.2d at pp. 510-511].) That rule mandates that factual findings shall not be set aside unless "clearly erroneous," and that due regard be given to the opportunity of the trial court to evaluate witness credibility.

The case presented the Supreme Court with an apparent conflict between the *New York Times* rule of independent appellate review and rule 52(a). (*Bose, supra,* 466 U.S. at pp. 498-499 [80 L.Ed.2d at p. 515].) The *Bose* court observed that in *New York Times,* in the parallel context of review of state jury verdicts, it had rejected a similar contention by the plaintiff there that the Seventh Amendment[4] precluded independent review of a state jury verdict. (*Id.,* at pp. 508-509, fn. 27 [80 L.Ed.2d at p. 522].)

"Recognizing that the Seventh Amendment's ban on reexamination of facts tried by a jury applied to a case coming from the state courts [citations], we found the argument without merit . . . [;] review of findings of fact is appropriate 'where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts.' " (*Ibid.*)

The high court held that notwithstanding rule 52(a), such a de novo review of "constitutional facts," i.e., facts underlying the finding of actual malice, was necessary to cases arising from bench trials in district court as well. (*Bose, supra,* 466 U.S. at pp.

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[4] The Seventh Amendment to the United States Constitution states in part that "no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."

498-499, 510-511, 514 [80 L.Ed.2d at pp. 515, 523, 525-526].) In so doing, it reiterated the holding of *New York Times* that reviewing courts are obligated to test the actual malice determination against the guaranties of the First and Fourteenth Amendments by making " 'an independent constitutional judgment on the facts of the case.' " (*Id.*, at pp. 508-509, fn. 27 [80 L.Ed.2d at p. 522]; *New York Times, supra,* 376 U.S. at p. 285 [11 L.Ed.2d at p. 709].)[5]

The court stressed that there are some issues which, even though largely factual in nature, entail stakes of such constitutional magnitude that they may not be entrusted "finally to the judgment of the trier of fact." (*Id.*, at p. 501, fn. 17 [80 L.Ed.2d at p. 517]; see also pp. 504-510 [80 L.Ed.2d at pp. 518-523] [discussing other types of First Amendment cases in which the factfinder's interpretation of the evidence is subject to independent appellate reevaluation].)[6]

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[5] *Bose* rejected any suggestion that the duty of independent review is affected by the length or complexity of the trial, or the amount of oral testimony versus documentary evidence adduced. (466 U.S. at pp. 500-501 [80 L.Ed.2d at p. 516].)

[6] Despite their differences with the majority over the role of rule 52(a)'s clearly erroneous standard, the dissenting justices in *Bose* themselves distinguished the federal bench verdict from the state court jury verdict. Cases which come to the reviewing court from a state court after a jury trial "present[ ] the strongest case for independent factfinding" by the appellate courts. (*Bose, supra,* 466 U.S. at p. 518, fn. 2 [80 L.Ed.2d at p. 528] (dis. opn. of Rehnquist, J.).)

Justice Rehnquist's dissenting opinion in *Bose* observed that it is much easier to justify independent review of jury-found facts due to the inherent vagueness of a general jury verdict and the extremely narrow latitude allowed appellate courts at common law to review such verdicts. (*Ibid.*)

In a similar vein, this court agrees with amici curiae, American Society of Newspaper Editors and American Newspaper Publishers Association, that *Bose* supports the proposition that the de novo rule of review applies with special force to jury verdicts. There is a greater danger that the jury will ignore the limits of the First Amendment, find for the plaintiff out of sympathy, or find against the defendant out of hostility to speech that ought to be protected. (See *Ollman v. Evans*

Indeed, in *Bose* the court specifically *rejected* the inferences drawn by the district court regarding Seligson's testimony on the issue of actual malice including the finding that his testimony on this issue was not credible. According to *Bose*, rather than realizing his statement was inaccurate at the time he wrote it, Seligson suffered simply from a "misconception" that "about the room" was the same as "along the wall." (*Bose, supra*, 466 U.S. at pp. 512-513 [80 L.Ed.2d at pp. 524-525].)

The district court's conclusion that Seligson's testimony, "I know what I heard," indicated that he must have realized the statement was false when he wrote it was deemed inappropriate. " 'Analysis of this kind may be adequate when the alleged libel purports to be an . . . account *of events that speak for themselves.*' [Citations.] Here, however, adoption of the language chosen was 'one of a number of possible rational interpretations' of an event 'that bristled with ambiguities' . . . . " (*Bose, supra*, 466 U.S. at p.512 [80 L.Ed.2d at pp. 524-525], italics in original.)

The high court also noted the existence of the normal rule that testimony disbelieved by the trier of fact "is not considered a sufficient basis for drawing a contrary conclusion." (*Bose, supra*, 466 U.S. at p. 512 [80 L.Ed.2d at p. 524].) However, it went on to suspend application of this rule to the actual malice context by salvaging Seligson's discredited testimony from the heap of disbelief and reinterpreting its constitutional import.

"In this case the trial judge found it impossible to believe that Seligson continued to maintain that the word 'about' meant 'across.' Seligson's testimony [however] does not constitute clear and convincing evidence of actual malice. Seligson displayed a capacity for rationalization. He had made a mistake and when confronted with it he refused to admit it and steadfastly at-

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(D.C. Cir. 1984) 750 F.2d 970, 1006 (conc. opn. of Bork, J.), cert. den. (1985) __ U.S. __ [86 L.Ed.2d 278, 105 S.Ct. 2662]; see *Bose, supra*, 466 U.S. at p. 518, fn. 2 [80 L.Ed.2d at p. 528] (dis. opn. by Rehnquist, J.).) "[T]he Supreme Court has told us (most recently in [*Bose*]) to be assiduous in protecting the press, even in its least worthy manifestations, from the fury of outraged juries." (*Douglass v. Hustler Magazine, Inc.* (7th Cir. 1985) 769 F.2d 1128, 1142.)

tempted to maintain that no mistake had been made—that the inaccurate was accurate. That attempt failed, but the fact that he made the attempt does not establish that he realized the inaccuracy at the time of the publication." (*Ibid.*)

Both the principles announced in *Bose* and the manner in which the high court carried out its function of independent review, are the guide to be followed in reviewing the evidence at hand.

First, this court must independently review all the evidence presented on the issue of actual malice. It may not restrict itself, as the Court of Appeal did, to evidence favorable to the judgment. By its repeated emphasis that a *New York Times* review includes the *whole* record on actual malice, the high court has made it unmistakably clear that it is constitutionally inadequate to review only those portions of the record that support the verdict. (See *Bose, supra,* 466 U.S. at pp. 508-509 and fn. 27 [80 L.Ed.2d at pp. 521-523]; *Letter Carriers v. Austin* (1974) 418 U.S. 264, 282 [41 L.Ed.2d 745, 760-761, 94 S.Ct. 2770]; *Beckley Newspapers v. Hanks* (1967) 389 U.S. 81, 82 [19 L.Ed.2d 248, 250, 88 S.Ct. 197]; *New York Times Co. v. Sullivan, supra,* 376 U.S. at p. 285 [11 L.Ed.2d at p. 709].)

Additionally, our independent assessment may in some cases involve review of evidence which, like Seligson's testimony in *Bose,* would be considered "discredited" under usual rules of appellate review of the jury verdict in favor of respondents. (See *Bose, supra,* 466 U.S. at p. 512 [80 L.Ed.2d at 524].)

Second, the execution of this "constitutional responsibility . . . cannot be delegated to the trier of fact" (*Bose, supra,* 466 U.S. at p. 501 [80 L.Ed.2d at p. 516], and requires this court to step beyond the usual confines of appellate review. Normal principles of substantial evidence review do not apply to the appellate court's independent review of an actual malice determination in a First Amendment libel case.[7]

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[7] Our court is not subject to the "clearly erroneous" standard of rule 52(a). However, the standard of review that rule prescribes is similar to the doctrine which restricts the power of our appellate courts to a

This court is not bound to consider the evidence of actual malice in the light most favorable to respondents or to draw all permissible inferences in favor of respondents. To do so would compromise the independence of our inquiry. "[T]he constitutional responsibility of independent review encompasses far more than [an] exercise in ritualistic inference granting." (*Tavoulareas v. Piro* (D.C.Cir. 1985) 759 F.2d 90, 147 (dis. opn. of J. Skelly Wright, J.), rehg. en banc granted, 763 F.2d 1472, 1481.)

Finally, if warranted, this court may do as the *Bose* court did with Seligson's testimony and substitute its own inferences on the issue of actual malice for those drawn by the trier of fact.[8] This court must independently determine the constitutional import of any particular witness's testimony as it relates to the question of actual malice. (See *Miller v. Fenton* (1985) U.S. [88 L.Ed.2d 405; 106 S.Ct. 445].)[9]

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determination whether there is any substantial evidence, contradicted or uncontradicted, which supports the verdict. (See *Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429 [45 P.2d 183]; 9 Witkin, Cal. Procedure (3d ed. 1985) § 278, pp. 289-291; *Wanless v. Rothballer* (1985) 136 Ill.App.3d 321 [483 N.E.2d 899, 902] [rule 52(a) is similar to usual prohibition in civil cases against disturbing the determination of trier of fact unless it is contrary to the manifest weight of the evidence].)

Moreover, *Bose* in effect represents merely an express extension to bench trials of the longstanding requirement of de novo review established in *New York Times* in the context of state jury verdicts. (See Monaghan, *Constitutional Fact Review* (1985) 85 Colum. L.Rev. 229, 230.) Thus, it is clear that, as in the case of rule 52(a), the substantial evidence rule does not prescribe the standard of review in First Amendment libel cases. To the extent that the substantial evidence doctrine conflicts with the rule of independent review in these cases, it must yield. (See *Franklin v. Leland Stan. Junior University* (1985) 172 Cal.App.3d 322, 330-333 [218 Cal.Rptr. 228].)

[8] This case is particularly well-suited for independent appellate review since the cornerstone of respondents' libel allegations, Thomas Porter, failed to testify at trial and was presented to the jury solely through the cold record of his deposition testimony.

[9] The Court of Appeal herein relied upon two pre-*Bose* cases, *Widener v. Pacific Gas & Electric Co.* (1977) 75 Cal.App.3d 415, 433 [142

III.

The crucial focus of actual malice under *New York Times* is the defendant's attitude, or state of mind, toward the allegedly libelous material published. (*St. Amant v. Thompson* (1968) 390 U.S. 727 [20 L.Ed.2d 262, 88 S.Ct. 1323]; *Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 256-259 [208 Cal.Rptr. 137, 690 P.2d 610].) In order to evaluate whether the evidence on this record is constitutionally adequate to support the judgment, it is necessary to set out at some length the complete factual record underlying the actual malice determination. However, this court is mindful that evidence concerning appellants' investigations and discoveries was not introduced for its truth, but only as it related to the state of mind of the appellants.

Preliminary Investigation by Bergman

In September of 1974, Willian Lee, Richard Lee's brother, approached Bergman, a freelance investigative journalist, with a request that he look into the fairness of the trial proceedings in Richard Lee's case. William Lee told Bergman that he felt his brother had not received a fair trail. He was concerned that the outcome of the trial might have been influenced by a report distributed and publicized by the California Department of Justice characterizing Chinese youth gangs as the major organized crime threat in the state. He had attended Richard Lee's trial and told Bergman that in his view, it had been tried on the "theory" that Richard Lee was a gangster and that "putting him away" would begin to solve gang problems in Chinatown.

Bergman initially refused William Lee's request to look into the matter, but eventually agreed to read the trial transcript since he was collecting information at the time on organized crime and Chinatown.

Cal.Rptr. 304], and *Bindrim v. Mitchell* (1979) 92 Cal.App.3d 61, 72 [155 Cal.Rptr. 29], for its conclusion that its review of the evidence was not de novo but was circumscribed instead by the substantial evidence rule. To the extent that *Widener* and *Bindrim* suggest that the reviewing court's duty to examine the record in public official defamation cases does not involve a de novo review of the actual malice determination, they are inconsistent with *Bose* and are hereby disapproved.

After his review of the transcript, Bergman concluded that there were several irregularities in Lee's case. For example, Bergman observed that respondent Merle had apparently not disclosed the existence of the key state's witness, Porter, until the time of trial. He found Porter's testimony difficult to believe. Bergman noted that during respondent McCoy's testimony in the Lee case, he identified two men in the courtroom audience as Chinatown gang members. Bergman perceived this procedure as "highly unusual" and designed to suggest to the jury that the men were present in order to intimidate May Tom during her testimony. Bergman also noted that when May Tom, the sole eyewitness at trial, was asked if Richard Lee was the person she saw kill Leong, she replied "I guess so."

Bergman made a general assessment that the trial proceedings "didn't look right"; that there might have been a miscarriage of justice. He decided to proceed with a preliminary investigation, to try to locate witnesses and to obtain additional information. His motivation to pursue the case was grounded in his belief that the alienation minority youths like Richard Lee experienced frequently led to unjust treatment from the law: "the way in which justice was meted out to them did not seem . . . to be fair, that it was necessary in some ways to maybe make some effort to rectify that situation."

Bergman subsequently had several conversations with William Lee, who also provided him with a copy of an affidavit he had obtained from Weyman Tso. Tso declared that he was present at the scene of the Leong killing but that Richard Lee, whom he knew well, was neither present nor involved.[10]

Bergman next conducted interviews as part of his preliminary investigation. He spoke with Berkeley City Council member Ying Lee Kelly regarding the relationship between law enforcement and the Asian community in the San Francisco area. She in-

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[10] Tso had been identified by May Tom on the night of the homicide as the second youth present at the killing. Although he was arrested and released in March of 1973, Tso was apparently never prosecuted in connection with the Leong incident. As noted, Tso's affidavit was attached as an exhibit to the Lee habeas corpus proceeding.

formed him that it was well known that organized crime, gambling and police payoffs occurred in the community. She also told him that Asian groups had sued the California Attorney General for the Department of Justice report which characterized Chinese youth gangs as a major organized crime threat. This was the same report that William Lee had told Bergman about. Bergman believed that the Attorney General had later publicly apologized for the report.

Bergman next spoke with Paul Avery, a 15-year veteran reporter of the San Francisco Chronicle, whose specialty was police reporting. Bergman had read an article by Avery on Merle's prosecution of another Chinatown youth "gang" case involving Joe Fong. Avery told Bergman that a youth named Clifton Wong had, through his attorney, admitted that he committed the crime of which Fong was accused and eventually convicted. Bergman's understanding was that although this exculpatory evidence was available to Merle, he did not reveal it at Fong's trial. Avery informed Bergman that Avery's sources in the San Francisco Police Department had informed him that the police were "after" Fong and intended to "put him away" on any charge possible.

Avery also gave Bergman information concerning May Tom. Avery and another reporter interviewed Tom after the Richard Lee trial. Avery stated that according to May Tom, Avery was the first person to inform her that she was the only eyewitness at the Lee trial. She told Avery that McCoy had told her there were 11 other "witnesses" in the Lee case. Avery subsequently arranged for Attorney Paul Halvonik to interview Tom. Avery informed Bergman that Tom gave a statement to Halvonik that was similar to the one she gave to Avery. Avery urged Bergman to get involved in the Lee case.

The following week, Bergman interviewed Paul Halvonik. Halvonik told Bergman that he had taken a statement from May Tom in which she expressed her distress about the Lee case: she felt she had been misled by Merle; she stated she had been shouted at by Merle; she indicated that her identification of Lee was not as strong as it appeared. May Tom also told Halvonik that she was extremely upset with Merle because he had given the jury the impression that if her testimony seemed equivocal it was

because she had been intimidated by Chinese gang members. In fact, she expressly told Merle that she did not feel intimidated at all. Halvonik further informed Bergman that while he did not feel Tom's statements were strong enough to overturn Lee's conviction, he did think that Lee would not have been convicted had the jury known how unsure she was of her identification.

In January of 1975, Bergman wrote to Porter in Federal prison in Indiana. Bergman stated that he was a journalist and researcher investigating the murder trial of Richard Lee and that he wanted to discuss Porter's trial testimony. Bergman alluded to "unorthodox" activities in other cases on the part of the San Francisco police and district attorney. He asked Porter to call him collect if he were interested in discussing what happened during the Lee proceedings.

Shortly thereafter, Porter telephoned Bergman collect. It is *undisputed* that in this first conversation, Porter told Bergman that he had testified falsely at the Lee trial. He told Bergman something had gone on between him and the authorities but that he did not want to go into details because he felt uncomfortable discussing the matter on the telephone. Porter also told Bergman that the authorities had promised him he would not have to return to California to serve more time and that his entire state sentence would be served concurrently with his federal time. For this reason Porter was very concerned about a California detainer lodged against him which would require him to return to California to serve more time after completing his federal sentence.[11]

Bergman did not know what a detainer was at the time, but told Porter he would try to check on Porter's legal status before visiting him in Indiana. Bergman testified that he did not promise Porter anything. Bergman told Porter that whether he would do anything for Porter "depended" on what happened when they met.

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[11] A detainer is a written notice of an unserved sentence or pending charge against a prisoner filed by law enforcement officials with prison authorities. It ensures that the detaining authority is notified and has the opportunity to take custody before the prisoner is released. (Smith & Snedeker, Cal. State Prisoners Handbook (1982) § 8.2, pp. 178-179.)

Bergman testified that Porter stated he had never done anything like what he did in Lee's trial; it "weighed" on him. In his notes of this telephone conversation, Bergman recorded the message Porter asked him to take to Richard Lee: "Let Richard know 'forgive me' . . . didn't do it because I wanted." Porter testified that in order to get Bergman to help him with the California detainer, he told Bergman he felt badly about lying at Lee's trial.

Porter acknowledged that in this first telephone call Bergman expressed concern about whether Richard Lee had been properly convicted. Other witnesses in the trial were going to change their testimony, Bergman said, and the San Francisco police had "pressured people." Porter took this statement as a "suggestion" that Bergman might want him to recant his testimony.[12] Porter felt that Bergman wanted to hear that Porter had not testified truthfully in the Lee trial and he thought that Bergman would help him if he recanted his trial testimony. Porter was willing to lie to Bergman in order to get help with his detainer. He asked how he could help and Bergman replied that Porter could help by making an affidavit. Porter told Bergman he was willing to meet with him to discuss the matter further.

Prior to visiting Porter, Bergman met with Attorney Charles Garry who was handling Richard Lee's direct appeal. Garry told Bergman that in his opinion Lee's conviction was a "travesty." He felt the defense had been inadequate and the case contained reversible error. Garry believed that Lee was a member of a group that law enforcement officials had singled out to "get" because they believed the group was guilty of certain crimes. Garry also informed Bergman that the prosecution is obligated to disclose to the defense evidence of promises to or recommendations made regarding a witness, so that the jury can adequately assess that witness's credibility.

Around this time, Bergman spoke with Attorney Patrick Hallinan who informed him he had filed a complaint against respon-

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[12] Porter first testified that Bergman told him during this first conversation that he thought Porter's testimony at the Lee trial was false. However, later, Porter flatly denied that Bergman had made such a statement.

dent Merle with the State Bar alleging that Merle had improperly interrogated a witness in another Chinatown case.

Development of Bergman's Relationship with Porter

Bergman visited Porter in prison in January of 1975. Their ensuing interchange is the basis of respondents' contention that Bergman actually knew Porter's allegations against them were false.

Bergman testified that when they met, Porter reiterated that he had lied at Lee's trial due to threats and coercion from respondents and that he had never before done such a thing. He told Bergman he would be willing to testify and to execute a sworn statement to that effect.

Porter testified that Bergman told him he represented Richard Lee and that he had come "to find out about me testifying in the courtroom . . . against Richard Lee." Bergman told Porter he felt that some of the things Porter had testified to were not true. Porter testified Bergman "was wondering" if Porter would be willing "to give another testimony." Porter claimed that when he told Bergman his testimony at the Lee trial was true, Bergman replied that he did not believe it; he thought it was false.

According to Porter, Bergman told him that if he changed his testimony, Richard Lee stood a chance of getting out and Porter would not have to "do that five to life," referring to the California detainer. Porter testified that when Bergman asked him whether McCoy and Erdelatz had threatened him, he said no; but Bergman then asked him again, "like it was—it's not going to work, change of testimony." At that point, Porter changed his story because he felt that Bergman would then help him get released from the detainer.

Porter also testified, however, that Bergman never came right out and told him to say certain things; he just made "suggestions" and used "leading questions." According to Porter, Bergman did not say outright that he wanted him to give an untrue statement; Bergman would not "just come out and say those words, no." Nor did Bergman "just come out and say 'recant your statement.'"

Porter confirmed that he told Bergman he testified falsely at Lee's trial and that it "weighed" on him. He explained that he was angry at respondents and he saw the meeting with Bergman as an opportunity to get back at them. Bergman testified he told Porter that as part of checking into the story, he would probably be checking into the detainer. He denied that he ever promised Porter any help in exchange for Porter's giving an affidavit and denied that there was any understanding to that effect.[13]

While Bergman had questions about some of the information Porter imparted to him, he also believed much of it could be true. He considered Porter to be taking a considerable risk to his personal safety by stepping forward and making allegations of misconduct against the police and prosecutor. He viewed Porter's willingness to give a sworn statement as an indication that he was telling the truth. His and Ramirez's subsequent investigation and discovery of information relating to the conduct of respondents in other cases increased his feeling that Porter's charges were believable. For these reasons and because of Porter's stated willingness to testify as well, it never occurred to Bergman that he was being conned.

After his interview with Porter, Bergman worked with William Lee in arranging for Indianapolis Attorney John Manning to take Porter's affidavit. Manning met with Porter in February and again in April of 1975. Based on his notes from these interviews, Manning prepared an affidavit which Porter signed in July of 1975. (See Appendix D.) Bergman did not participate in the preparation of the affidavit.[14] Manning testified that at some point before the articles were published, he indicated to Bergman that

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[13] Bergman made notes of this interview and later transformed them into a typewritten summary. he noted that ". . . much of the conversation with Porter revolved around his feelings concerning Richard's imprisonment. He asked about Richard's condition and expressed regret." According to Bergman's notes, Porter told him he understood that, in Porter's words, "actions are what count," and that until then, Bergman and others "could promise little help."

[14] In addition to recounting what Porter told Bergman in their interview, the affidavit alleged that when Porter refused to testify as respon-

he had some doubt abnout Porter's veracity. Bergman testified that Manning commented only about the lack of weight the testimony of Porter, a convict, would have in a legal proceeding.

Between February and June of 1975, Bergman inquired about the status of Porter's detainer, as he indicated he would do, and corresponded with Porter on this issue. Bergman believed there might be a record of any promise made to Porter that he would not have to return to California. Bergman contacted Attorney Bruce Hotchkiss who confirmed that there was a letter in Porter's file reflecting a recommendation from law enforcement officials regarding the detainer. In addition, Bergman was referred through Attorney Halvonik to Alice Lytle in the Governor's office. Bergman contacted Lytle and informed her of Porter's concerns about the detainer. She apparently suggested Porter write to the Governor's office directly; Bergman passed that address on to Porter.

In June, Bergman wrote to Porter regarding Porter's concern that unless the detainer were dropped, he might still be in custody when he returned to California to testify on Lee's behalf in connection with the affidavit. Porter was afraid his life would be in danger under those circumstances. Bergman wrote that " . . . we should be clear about my role: (1) I'm trying to set the record straight and that is my motivation; (2) I can't make promises or go to bat for you in a full scale way until Manning finishes otherwise it will all get very complicated. I thought we had a clear understanding there."

According to Bergman, he wrote this letter to Porter because he needed Porter to step forward with his allegations in a sworn affidavit so there would be documentary proof that a "deal" had been made between Porter and respondents. The "understanding" was that Porter would "go through all the way" and sign the affidavit to make up for the lies he told against Lee. Bergman would then try to protect him as much as he could should Porter have to return to California to testify in the Lee matter.

Bergman felt that unless Porter were willing to step forward with a sworn statement as he had initially indicated he would, the

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dents had instructed. McCoy and Erdelatz took him to an elevator near their office where they struck, kicked, and threatened to kill him.

situation would become complicated because Porter would be "put on the spot as to whether or not he had said these things." Bergman testified he was not sure he would have been so concerned about Porter unless Porter had been willing to sign the affidavit. Bergman denied that "going to bat in a full scale way" meant helping on the detainer; instead it referred to those efforts he would make to ensure Porter's safety once he did commit himself in a sworn statement.[15]

Investigation by Bergman and Ramirez

In April of 1975, Bergman and William Lee persuaded the Examiner to pursue the Richard Lee story. Appellant Ramirez, a reporter for the Examiner, was assigned to work with Bergman in developing and investigating the story. Bergman's role was to cooperate with Ramirez in the investigation and to maintain contact with Porter. Ramirez's role was to investigate and write the articles. During the following year, Bergman and Ramirez interviewed between 35 and 40 people including attorneys, law enforcement officials, writers and experts on Asian youth and community issues, and friends and associates of Richard Lee. They also reviewed documents on Lee's background and the court files and police records in his and other cases.

In the course of these efforts, the reporters uncovered several items which *in their minds* directly and indirectly corroborated Porter's allegations. The most significant of these involved perceived misconduct by respondents in the circumstances.[16]

1. The reporters located a pretrial discovery order in the Lee case requiring the prosecution to furnish the defense with, inter

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[15] On August 19, 1975, Alice Lytle informed Porter by letter that the California parole board had authorized the parole board at Terre Haute to handle the parole determination on his state charges, thereby eliminating the necessity of his being returned to California for a parole hearing.

[16] It should be emphasized that whether any misconduct occurred is irrelevant to resolution of the issue of appellants' subjective state of mind. Instead, it is appellants' subjective attitude toward the information they discovered which properly bears on the issue of actual malice.

alia, any and all statements, admissions and/or confessions of the accused and any and all statements of people who might be called as prosecution witnesses. They knew from conversations with Lee's trial attorney and from their reading of the trial transcript, that respondent Merle had not disclosed Porter's existence until the first day of trial. They also knew that the trial judge had denied a defense request for a continuance based on the disclosure of surprise witness Porter. Therefore, appellants perceived Merle's failure to disclose Porter's existence as an indication of misconduct, as corroborative of Porter's misconduct allegations, and as further support for their theory that Lee was denied a fair trial.[17]

2. The reporters learned that after trial and before sentencing, without notifying Lee's counsel, McCoy and Erdelatz brought Lee to the homicide bureau for questioning about another case. McCoy later informed the probation department that during this interrogation, Lee had "confirmed" that the evidence presented at his trial was correct. Lee, however, told Ramirez this was untrue. The reporters argued that the conduct of McCoy and Erdelatz in speaking to Lee before sentencing and without counsel was improper and that it was highly improbable that Lee had discussed his case.[18]

3. Porter steadfastly maintained he had been "promised" certain benefits for his trial testimony in the Lee case.[19] The reporters checked with attorneys and reviewed records which

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[17] Merle testified that he did not reveal Porter's existence until the first day of trial because he did not believe the discovery order included confidential informants such as Porter.

[18] Erdelatz testified that Lee did not say much during this posttrial interrogation, but just nodded his head affirmatively in response to questioning by McCoy.

[19] Porter continued to maintain in this case that before he testified in the Lee case, respondents promised him that his state sentence would be served concurrently with his federal sentence; that his entire sentence would be served in federal institutions; that he would not be returned to California to serve time; and that his crime partner and girlfriend would be released from custody after 90 days observation.

indicated to them that some type of arrangement had in fact been made between Porter and one or more of respondents in exchange for Porter's testimony. The removal of Porter's detainer by the parole board in late 1975 superficially corroborated Porter's claim that he benefited in exchange for his testimony. From the reporters' perspective, respondents acted improperly both by promising Porter benefits for his testimony and by not disclosing the arrangement to the defense.

4. The reporters also learned of formal and informal complaints against respondent Merle in other cases. Attorney Patrick Hallinan gave them a copy of his formal complaint against Merle to the State Bar. Hallinan maintained that Merle had improperly interrogated his client, Dean Tom, despite his knowledge that Tom was represented by counsel. Later, according to Hallinan's charges, Merle had lied in court about the matter.

In addition, Paul Avery informed both reporters that Merle had suppressed exculpatory evidence involving Clifton Wong's confession that he committed the crime for which Merle was prosecuting Joe Fong. Similarly, Dennis Flanders, who worked at the Police Activities League and had testified against Joe Fong, informed Ramirez that he believed Fong had been "framed" and unfairly convicted. Ramirez also read a newspaper story which reported a case in which an attorney was cited for contempt of court for having told Merle, a witness in the case, to "crawl down from the witness stand."

5. Porter told Bergman that during one of his meetings with Merle, he overheard Merle telephone a United States Army sergeant and suggest that an Asian man be dishonorably discharged in retaliation for failing to cooperate with Merle on a murder case. In the course of their investigation, Bergman and Ramirez obtained a copy of a letter from Merle to Major G.W. Sims memorializing their earlier telephone conversation concerning Johnson Lam, who was apparently under Sim's authority. In the letter, Merle stated that Lam, a victim of a severe beating by a Chinese youth gang, refused to testify and was extremely uncooperative, evasive and angry. Merle characterized Lam as having a "negative attitude towards a serious problem in . . . society as well as a problem of his own people. . . ."

The reporters argued that this letter was corroborative of Porter's version of Merle's telphone call.

6. Bergman and Ramirez also had access to a transcript of an interview between Attorney Sandra Terzian and May Tom as well as an affidavit by May Tom prepared by Attorney Roger Ruffin. Therefore, they were aware of Tom's sworn statement that she was unsure of her identification of Lee as Leong's killer and that her attempts to communicate this uncertainty to respondents had been met with anger and misrepresentations about the importance of her role in the case.[20] Ramirez interviewed May Tom four or five times and had several telephone conversations with her about her testimony in the Lee case.

The reporters attempted to corroborate Porter's story through other channels as well. For example, Ramirez worked with several sheriff's deputies in an unsuccessful effort to locate jail records which might document the many meetings Porter alleged he had with respondents. The department's undersheriff informed Ramirez that record keeping was often intentionally incomplete due to security concerns. As a result, Ramirez did not consider his inability to locate any records on Porter's movement as undercutting Porter's claim that he had met with respondents numerous times.

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[20] May Tom's affidavit contained additional allegations of misconduct against respondents. She averred that she selected Lee's photograph as the killer because she had seen him in Chinatown in the past and that when McCoy and Erdelatz were showing her photographs she was under the impression she had to keep looking until she picked someone out. She subsequently believed she had made a mistake in her selction of Lee as the killer but when she informed McCoy and/or Erdelatz of this, one of them told her there were 11 other witnesses who had identified Lee as the gunman.

She further declared that she picked Lee at the corporeal lineup because when she told the police she was not sure she could recognize Leong's killer, someone, probably McCoy, told her just to pick out the person whose photograph she had selected earlier. When she told Merle she was uncertain of her identification he became very angry at her. She stated she identified Lee at the preliminary examination even though she did not believe he was the gunman.

Bergman and Ramirez also made repeated but unsuccessful efforts to locate three persons—Porter's sister, his crime partner and girlfriend, and missionary—to whom Porter said he had previously related his allegations about respondents.

Apart from attempting to corroborate Porter's charges against respondent, the reporters gathered information regarding other aspects of the Lee case. For example, they spoke with Lee's attorney, Lee's friends and associates, and with alibi witnesses never called to testify by the defense. They interviewed Weyman Tso several times. Tso reiterated the gist of his sworn affidavit which William Lee had shown Bergman: Tso had witnessed the shooting of Leong and knew that Lee was not involved.

Finally, the reporters contacted several people to gather background information on Chinese "youth gangs" and on the relationship between the Chinatown community and law enforcement.[21]

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[21] They interviewed: Sergeant George Huegle of the San Francisco Police Department Intelligence Unit, an officer familiar with the Chinatown community; Inspector Herb Lee of the San Francisco Police Department Juvenile Detail, who was familiar with Chinatown youth; Inspector Diarmuid Philpott, a specialist on Chinatown and Chinatown youth; Officers Terry Sullivan and Dennis Flanders of the San Francisco Police Activities League; Officer Leon Getchell of the San Francisco Police Department Narcotics Division; Officer Fred Lau of the San Francisco Police Department Community Relations Unit; Inspector Art Fobbs of the Juvenile Bureau of the San Francisco Police Department; Captain James Curran of the San Francisco central police station; Officer Art Tappia of the San Francisco Police Department and a board member of Chinese Youth Alternatives; Wayne Yee and Ron Albers of Chinese Youth Alternatives; Atea Koon, director of the Youth Service Center in Chinatown; Donald Wong, staff member with Chinese for Affirmative Action; Jack Woo, president of the Chinese Six Companies; Rose Pak, a San Francisco Chronicle correspondent; George Woo, a professor of Asian American studies at San Francisco State University; Al Martinez, a reporter for the Los Angeles Times, who had written a story about Chinese youth violence; Cynthia Gurney, a reporter for the Washington Post, who was preparing a story on Chinatown youth crime; Jennifer Thompson, who was preparing to write a story about Richard Lee and Joe Fong for San Francisco Magazine; Reverend Gordon

Ramirez and the State Bar Allegations Involving Merle

During the course of appellants' investigation, attorney Patrick Hallinan provided Ramirez with a copy of the letter he had filed against Merle with the State Bar of California. As noted, this letter charged that despite Merle's knowledge that Hallinan represented Dean Tom, Merle had improperly interrogated Tom without counsel. Hallinan also told Ramirez that it was his understanding there had been a recommendation within the bar that Merle be disciplined on the Tom matter.

Several months later, Ramirez checked with Hallinan again about the status of Merle complaint. Hallinan told Ramirez that a full committee of the bar had reversed a panel's earlier recommendation that Merle be disciplined. Ramirez was also informed by someone at the State Bar that as a matter of policy the bar did not release information about pending complaints.

In the article of May 21, 1976, Ramirez wrote that a State Bar disciplinary review committee had decided to sanction Merle for his alleged misconduct in a 1973 Chinatown case. Ramirez added that according to State Bar officials, no official action had been taken. Ramirez's original draft of this article stated that a bar panel had recommended that Merle be sanctioned for alleged misconduct, but that "a larger committee overturned this suggestion." Ramirez testifed that after he wrote this draft, but prior to publication, he received "additional information" that caused him to change the story to its final version, omitting any reference to the fact that the recommendation to impose sanctions had been overturned. He further testified that when he submitted that final version for publication, he believed it was accurate.

MacLain, executive director of Youth for Christ in Santa Clara County, who had written about youth in Chinatown and youth and delinquency in other communities and had visited Joe Fong in prison; Gary Pang, a friend of Richard Lee and Joe Fong; Ben Fong Torres, the brother of Barry Fong Torres, who was killed the night Joe Fong and Richard Lee were arrested; and Joe Fong.

IV.

This case presents "the delicate and sensitive task of accommodating the First Amendment's protection of free expression of ideas with the common law's protection of an individual's interest in reputation." (*Ollman v. Evans, supra,* 750 F.2d at p. 974.) Libel laws recognize that each person has a right not to be disparaged by false statements. (Eldredge, The Law of Defamation (1978) § 4, p. 8.)[22] Society's interest in redressing the harm done to one's reputation is strong. (*Rosenblatt v. Baer, supra,* 383 U.S. at p. 86 [15 L.Ed.2d at pp. 605-606].) Moreover, this court is not unmindful that "[t]he harm done to one's reputation by erroneous charges of corruption or dishonesty can never be fully undone . . . . For even an erased question mark still suffices to raise the question, where perhaps none existed before." (Bird, *The Role of the Press in a First Amendment Society* (1980) 20 Santa Clara L.Rev. 1, 8 [hereafter *Role of the Press*].)

There exists a substantial tension between the protection of these reputational interests and the commitment to free debate. (See *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 342 [41 L.Ed.2d 789, 806-807, 94 S.Ct. 2997].) Few events place this tension in such graphic relief as when false accusations of corruption are disseminated in an irresponsible and gratuitous fashion by an indifferent and powerful press.

Nevertheless, press responsibility is not constitutionally mandated nor can it be legislatively or judicially compelled. (See *Miami Herald Publishing Co. v. Tornillo* (1974) 418 U.S. 241, 256 [41 L.Ed.2d 730, 740, 94 S.Ct. 2831].) The First Amendment grants the press a privilege to report and comment upon official actions with no requirement that an individual's reputation be spared. (*Rosenbloom v. Metromedia, supra,* 403 U.S. 29, 62

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[22] " 'Good character, or reputation, consists of the general opinion of people respecting one. It is built up by a lifetime of conduct. It is probably the dearest possession that a man has, and once lost is almost impossible to regain. The possession of a good reputation is conducive to happiness in life and contentment. The loss of it, . . . brings shame, misery and heartache.' " (Eldredge, The Law of Defamation, *supra,* at pp. 12-13, quoting Judge James Gay Gordon, Jr.)

[29 L.Ed.2d 296, 322], conc. opn. of White, J.) As this court recently observed: "Fair and objective reporting may be a worthy ideal, but there is also room, within the protection of the First Amendment, for writing which seeks to expose wrongdoing and arouse righteous anger . . . ." (*Reader's Digest Assn. v. Superior Court, supra,* 37 Cal.3d at p. 259.)

The constitutional protections afforded the media under *New York Times* present a formidable barrier to public official plaintiffs. Equally formidable, however, are those principles which prompted the high court's articulation of the concept of constitutional malice.

The public possesses an "independent interest" in the qualifications and performance of its public officials. (See *Rosenblatt v. Baer, supra,* 383 U.S. at pp. 85-86 [15 L.Ed.2d at p. 605]; *Curtis Publishing Co. v. Butts* (1967) 388 U.S. 130, 153 [18 L.Ed.2d 1094, 1110, 87 S.Ct. 1975].) To effectuate this interest, the public relies upon the press as its agent to gather and disseminate this information (see *Saxbe v. Washington Post Co.* (1974) 417 U.S. 843, 863 [41 L.Ed.2d 514, 527, 94 S.Ct. 2811] (dis. opn. of Powell, J.), as well as to provide a forum for the expression of criticism and opinion.

"The Constitution specifically selected the press . . . to play an important role in the discussion of public affairs. Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve." (*Mills v. Alabama* (1966) 384 U.S. 214, 219 [16 L.Ed.2d 484, 488, 86 S.Ct. 1434].)

Indeed, the press is our citizenry's single most important check on governmental misconduct and secrecy. (*Role of the Press, supra,* 20 Santa Clara L.Rev. at p. 3.) Informed public opinion is "the most potent of all restraints" upon governmental wrongdoing or mismanagement. (*Grosjean v. American Press Co.* (1936) 297 U.S. 233, 250 [80 L.Ed. 660, 668-669, 56 S.Ct. 444].)

However, it is often impossible for an individual to obtain information about misconduct in government unless the press

provides it. (Note, *The Right of the Press to Gather Information Under the First Amendment* (1978) 12 Loyola L.A. L.Rev. 357, 359.) Thus, it is fundamental that "[c]riticism of goverment is at the very center of the constitutionally protected area of free discussion. Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized." (*Rosenblatt v. Baer, supra,* 383 U.S. at p. 85 [15 L.Ed.2d at p. 605]; *Gomes v. Fried, supra,* 136 Cal.App.3d at p. 932.)

This court's independent examination of the record must be conducted against the backdrop of our society's "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." (*New York Times, supra,* 376 U.S. at p. 270 [11 L.Ed.2d at p. 701].)

For these reasons, respondents as public officials must sometimes bear scathing and even false attacks subject only to those narrowly circumscribed exceptions embodied in the concept of actual malice. The public's interest in reports of official misconduct, *even if they are factually erroneous and damaging,* outweighs the reputational interest of any individual. (See *New York Times, supra,* 376 U.S. at pp. 271-272 [11 L.Ed.2d at p. 701].)

As noted, liability under *New York Times* requires clear and convincing proof of a knowing falsehood or of reckless disregard for the truth. (*New York Times, supra,* 376 U.S. at pp. 285-286 [11 L.Ed.2d at pp. 709-710].) Recovery by public officials in defamation actions is constitutionally barred unless evidence is produced "of either deliberate falsification or reckless publication 'despite the publisher's awareness of probable falsity' . . . ." (*St. Amant v. Thompson, supra,* 390 U.S. at p. 731 [20 L.Ed.2d at p. 267].)

Reckless disregard for the truth "is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." (*St. Amant, supra,* 309 U.S. at p. 731 [20 L.Ed.2d at p. 267].) Lack of due

care is not the measure of liability, nor is gross or even extreme negligence. (*Reader's Digest Assn. v. Superior Court, supra,* 37 Cal.3d at p. 259, fn. 11.)

St. Amant named several circumstances which may give rise to serious doubts. "The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." (*St. Amant, supra,* 390 U.S. at p. 732 [20 L.Ed.2d at pp. 267-268].)

However, as this court recently explained, neither investigatory failures, proof of the publisher's ill will, nor lack of objectivity will necessarily deprive even a defamatory falsehood of privileged status. (See *Reader's Digest Assn. v. Superior Court, supra,* 37 Cal.3d at pp. 258-259; *St. Amant, supra,* 390 U.S. at p. 733 [20 L.Ed.2d at p. 268]; *Gomes v. Fried, supra,* 136 Cal.App.3d at pp. 934-935.)

In order to substantiate their claim of actual knowledge of falsity, respondents rely primarily on several pieces of Porter's deposition testimony. They assert this testimony establishes with convincing clarity that an arrangement was made between Porter and Bergman whereby Porter would provide a false affidavit in exchange for Bergman's help in getting the detainer lifted. Respondents also argue appellants were reckless in ignoring information and failing to pursue several areas of investigation which would have demonstrated that Porter's affidavit was false and that Richard Lee was guilty.

Appellants, in turn, contend that the investigation they undertook to corroborate Porter and to develop the Richard Lee story proves their good faith belief in the probable truth of Porter's allegations. They argue that no deal was struck between Porter and Bergman and that they cannot be faulted for relying on Porter

since they uncovered a substantial amount of information which they honestly believed corroborated Porter's veracity. Appellants maintain that respondents seek to impose a double standard whereby respondents could rely on Porter to prove up their libel claim, but would preclude appellants' similar reliance upon Porter in publishing the articles. Appellants also contend that their thoroughness in investigating the entire context of the Lee case establishes that they published without malice.

Initially, respondents argue that Porter's testimony concerning the prison interview shows that Bergman not only knew the affidavit was false but helped create it. The record, however, is not nearly so clear.

The tone of the prison interview was established by Porter during the first telephone conversation with Bergman. Porter not only told Bergman he had lied at the trial because of something respondents had done, but also expressed great remorse and even begged Lee's forgiveness. Bergman's testimony, and especially his contempraneous notes of that conversation ("Let Richard know 'forgive me' . . . didn't do it because I wanted") strongly corroborate Porter's account. But it is Porter's *own* testimony that leaves no doubt he intended to and did convince Bergman that he was speaking the truth when he claimed to have lied at trial. Porter's admitted motive for lying was to get Bergman to visit him in order to obtain Bergman's assistance with the detainer.[23]

Bergman experienced an "emotional reaction" to this conversation in which Porter so persuasively pleaded for forgiveness and divulged his feelings of guilt and remorse. Bergman gave a lot of credence to Porter, particularly because Porter was allowing him to visit. In addition, by the time of the visit, several ostensibly credible sources[24] had given Bergman reason to believe that there

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[23] Porter had already made several inquiries about the detainer to other people and organizations. He testified his only concern was to get the detainer released and he was willing to do anything, and to use anyone, to accomplish that end.

[24] These sources were William Lee, reporter Avery, and Attorneys Garry, Halvonik and Hallinan.

might have been serious problems with the manner in which Lee was convicted, and that the persons responsible for producing Porter as the state's key witness might have engaged in questionable behavior in Lee's case and others. In view of Bergman's state of mind, his reaction to Porter's momentary story change at the subsequent interview was neither surprising nor suspect.

According to Porter, Bergman opened the interview by reiterating the very thing Porter told him over the telephone: he believed some of Porter's trial testimony was false. He was interested in getting a statement from Porter to that effect, or in Porter's words, "another testimony." When Porter told Bergman he had told the truth at trial, Bergman expressed disbelief and said he thought the testimony was false.

It is unclear from Porter's deposition testimony whether this response—the lynchpin of respondents' argument—merely reflected Bergman's confusion over the discrepancy between Porter's posture on the telephone and his new position (i.e., he thought Porter had told him that the testimony was false); or reflected Bergman's statement of his own belief that Porter had lied.

In either case, respondents err in relying on this isolated piece of ambiguous evidence as sufficiently *clear and convincing* proof that Bergman knowingly solicited the intricate lie that Porter proceeded to tell and tell again. As the Supreme Court stated in *Bose Corp. v. Consumers Union of U.S., Inc., supra,* " '[a]nalysis of this kind may be adequate when the alleged libel purports to be an . . . account of events that speak for themselves,' " but is not appropriate where the event in issue " 'bristle[s] with ambiguities.' " (466 U.S. 485 at pp. 512-513 [80 L.Ed.2d at p. 525], italics omitted.)

Bergman's reaction prompted Porter immediately to look to Bergman for cues and to fashion his story accordingly. He interpreted Bergman's remarks as "suggestions" of what Bergman wanted to hear.[25] Experienced at manipulation, Porter was able to

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[25] Porter's testimony that "[n]obody comes out and says something. You know, you just only suggest," itself indicates that he may have had

identify Bergman's concern that Lee had been unfairly convicted and exploit it. Porter acknowledged that Bergman did not tell him to say anything. In fact, by the time he gave his affidavit to Manning, Porter was quite convinced he had managed to "run a scam" on both Bergman and Manning.[26]

Furthermore, there is no evidence that Bergman's request that Porter give another story was a request that Porter give *false* testimony, although Porter apparently construed it as such a "suggestion," or came as a response to Porter's telling him that he had told the truth at trial.

Rather, the record as a whole indicates that Bergman asked Porter if, based on what Porter had told him about respondents' behavior, he would be willing to step forward to right the wrong he had committed against Lee—to give a different statement than he had given at trial. This evidence is a far cry from clear and convincing proof that Bergman's request that Porter give a different story was a request that Porter *lie*.

The record does demonstrate that Bergman agreed to help Porter on the detainer matter because Porter was willing to execute a sworn statement documenting his oral allegations. Bergman testified that he probably would not have continued to make inquiries about the detainer had Porter not signed the affidavit. However, unless Bergman were actually aware that Porter's claims were false, nothing illicit existed between them.[27]

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a propensity to construe virtually anything said to him as a "suggestion" of what he should say or do.

[26] Porter testified that the reason he included so many of the defamatory details in the affidavit he recited to Manning was because he thought they would make his story more believable.

[27] Bergman's denial at trial that any arrangement was made between him and Porter regarding the detainer may indicate Bergman's misconception of what transpired or even a "capacity for rationalization." (*Bose, supra*, 466 U.S. at pp. 512, 513 [80 L.Ed.2d at pp. 524, 525].) However, neither this testimony nor Bergman's letters to Porter reporting on his inquiries about the detainer demonstrates that Bergman knew Porter was lying.

While it may have been foolish and even grossly negligent of Bergman to entertain any discussion at all about the detainer at the same time he was asking Porter to swear to his accusations in an affidavit, this juxtaposition of events is of no moment if Bergman did not know Porter's accusations were false. Bergman's offer to make inquiries on behalf of someone incarcerated and unable effectively, or as easily, to fulfill a promise both men believed respondents had already made, was not nefarious. Absent knowledge of falsity, any arrangement between Porter and Bergman regarding the detainer was lacking in constitutional malice *considering Bergman's subjective viewpoint.*

In sum, the conversation that occurred during the interview is constitutionally inadequate to support a conclusion either that Bergman knew Porter's allegations were false or that he fabricated them. It may be appropriate to fault Bergman for his credulity, his failure to be more cynical or guarded in his responses to Porter, and particularly for his ill-timed offer of assistance with the detainer. However, the ambiguous statements and conduct upon which respondents rely do not demonstrate with convincing clarity that Bergman acted with knowledge of falsity.

Respondents also contend that appellants were reckless for failing (1) to reject Porter as an obviously biased source; (2) to reject his charges as inherently incredible; and (3) to investigate adequately his accusations. Respondents analogize appellants' reliance on Porter to the defendants' reliance on informant Burnett in *Curtis Publishing Co. v. Butts, supra,* 388 U.S. 130.

However, the plurality opinion in *Butts,* a "public figure" case, analyzed the adequacy of the investigation undertaken in preparation of the article in terms of whether it showed "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." (388 U.S. at p. 155 [18 L.Ed.2d at p. 1111].) This court has previously noted in *Reader's Digest Assn. v. Superior Court, supra,* 37 Cal.3d at p. 258, fn. 9, that the *Butts* standard is an *objective* one which has since been superseded by the subjective standard propounded in *St. Amant v. Thompson,*

supra, 390 U.S. 727. Accordingly, respondents' reliance on *Butts* is misplaced.

Therefore, we must look to *St. Amant* for guidance. That case concerned a television broadcast in which defendant, St. Amant, repeated charges made by one Albin, a member of the Teamsters Union, that plaintiff Thompson, a deputy sheriff, had been involved in illegal payoffs and official corruption with St. Amant's political opponent. The Supreme Court held that Thompson had not satisfied his constitutional burden of showing that St. Amant's reliance on Albin was reckless.

In explaining the holding, the high court first clarified that in order to find a defendant published with reckless disregard, there must be either (1) "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication"; or (2) "obvious reasons to doubt the veracity of the informant or the accuracy of his reports." (*St. Amant, supra*, 390 U.S. at pp. 731, 732 [20 L.Ed.2d at pp. 267, 268].) The court then made the following observations of Albin's reliability. However, the most the state court could say was that there was no evidence in the record of Albin's reputation for veracity, and this fact merely underlines the failure of Thompson's evidence to demonstrate a low community assessment of Albin's trustworthiness or unsatisfactory experience with him by St. Amant.

"Other facts in this record support our view. St. Amant made his broadcast in June 1962. He had known Albin since October 1961, when he first met him with members of the dissident Teamsters faction. St. Amant testified that he had verified other aspects of Albin's information *and that he had affidavits from others*. Moreover *Albin swore* to his answers, first in writing and later in the presence of newsmen. According to Albin, he was prepared to substantiate his charges. St. Amant knew that Albin was engaged in an internal struggle in the union; *Albin seemed to St. Amant to be placing himself in personal danger by publicly airing the details of the dispute.*" (390 U.S. at p. 733 [20 L.Ed.2d at p. 268], italics added.)

Preliminarily, it should be noted that Porter's charges that he had been coerced, struck and otherwise improperly induced to testify are not inherently improbable. *New York Times* and its progeny are founded upon the assumption that corruption at all levels of government, including those branches charged with enforcement and prosecution of the penal laws, exists and needs to be aired.

Moreover, on October 27, 1977, this court granted Richard Lee's petition for hearing, which was supported by Porter's allegations against respondents, and issued an order to show cause why relief in Lee's habeas corpus matter should not be granted. The superior court was ordered to hold an evidentiary hearing on the factual disputes raised by the petition.[28]

Significantly, in determining whether to grant such relief, this court had before it not only Porter's original affidavit but also his sworn recantations of that document contained in his affidavit of July 22, 1976, and in his deposition testimony. Therefore, appellants can scarcely be considered reckless for not rejecting Porter's allegations out of hand when this court has previously found those same charges to be sufficient to warrant further judicial intervention.

Appellants, and particularly Bergman, had reason to believe most of Porter's story. Porter was very worried that his life would be in jeopardy should he be returned to California to testify on Lee's behalf. There, Porter would be under the physical control of the people he had accused of misconduct. He expressed these concerns to Bergman several times. Like the source in *St. Amant*, Porter swore to his allegations in writing and told Bergman he was willing to testify if Bergman would "go to bat" for him and help assure his personal safety. Porter seemed to Bergman "to be placing himself in personal danger by publicly airing the details . . ." of his charges against respondents. (*St. Amant, supra*, 390 U.S. at p. 733 [20 L.Ed.2d at p. 268].)

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[28] The order was signed by associate Justices Manuel, Richardson, Mosk and Newman and by Chief Justice Bird.

Bergman's opinion of Porter's veracity was further influenced by Roger Ruffin, an experienced attorney and former municipal and superior court judge. Ruffin told Bergman that in his opinion the materials in the habeas corpus matter including Porter's affidavit constituted an excellent case for relief, and that Lee's habeas corpus case was one of the most complete he had seen.[29] (Contrast, *Curtis Publishing Co. v. Butts, supra,* 388 U.S. at p. 158 [18 L.Ed.2d at pp. 1112-1113] [media defendant's conduct held highly unreasonable due to failure to check source's story with someone knowledgeable in the field].)

Finally, it is noteworthy that respondents now seek a ruling from this court that since Porter was a prisoner with something to gain, there were obvious reasons to doubt his credibility and thus any reliance on Porter was reckless. Yet, thrice in the history of these proceedings, respondents have relied upon statements and stories from Porter: once, to convict Richard Lee; a second time to defeat Lee's habeas corpus claims; and a third time to obtain a multi-million dollar libel judgment. These litigious ironies do not excuse appellants from accountability for recklessness *if* they possessed a " 'high degree of awareness of . . . probable falsity.' " (See *St. Amant, supra,* 390 U.S. at p. 731 [20 L.Ed.2d at p. 267].) However, they do undermine the strength of respondents' suggestion that "only a reckless man" could have believed the things Porter had to say. (*Id.,* at p. 732 [20 L.Ed.2d at p. 268].)

The Supreme Court has consistently confirmed that in the constitutional malice context, failure to investigate does not in and of itself establish bad faith. (See, e.g., *St. Amant, supra,* 390 U.S. at p. 733 [20 L.Ed.2d at p. 268]; *New York Times, supra,* 376 U.S. at pp. 287-288 [11 L.Ed.2d at p. 711]; *Beckley Newspapers v. Hanks, supra,* 389 U.S. 81, 84-85 [19 L.Ed.2d 248, 251-252].) Respondents nevertheless point to investigational deficiencies and claim these demonstrate reckless conduct. However, this court notes that appellants uncovered information during their

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[29] As noted, Ruffin included Porter's affidavit as an exhibit to the petition for writ of habeas corpus filed in superior court shortly after the articles were published.

one-and-a-half-year investigation which in their minds corroborated Porter's charges.

For example, appellants obtained independent information which they believed substantiated Porter's claim that respondents had made certain promises in exchange for his testimony. They spent several hours trying to locate jail records to support Porter's claim that he had repeatedly met with respondents. They attempted, albeit unsuccessfully, to find examples of prior recitations by Porter of his story. In their opinion, there was no necessary correlation between the failure to locate certain witnesses or records and any lack of veracity on Porter's part.[30]

Most importantly, they learned from several sources that respondents had been accused by others of misconduct and questionable practices. Again, whether these similar accusations of misconduct were true is not in issue. What is dispositive is that appellants relied upon these ostensibly credible sources in forming a judgment that Porter's claims might have some validity.

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[30] Two examples illustrate that appellants' reasoning was arguably sound. Porter himself, testifying as respondents' key witness, never changed his story that he did in fact know a missionary named Louis Abbott who had visited him in jail. Although Bergman testified that someone at the jail told him a missionary named Louis Abbott did exist, respondents point to appellants' failure to document Abbott's existence as evidence of recklessness. Yet according to Porter, respondents' own witness, Abbott did exist. Thus, the fact that appellants were unable independently to document Abbott's existence does not establish that Porter invented him.

Similarly, Porter claimed in the original affidavit that he had received treatment at a "jail hospital" for a cyst which had been seriously aggravated when respondent Erdelatz kicked him. Later, although Porter recanted his allegation that he had been kicked, he testified on behalf of respondents that he had in fact received hospital treatment for a cyst that developed after he fell out of bed. When Ramirez attempted to locate medical records of the cyst to corroborate Porter's allegation that he had been kicked, sheriff's deputies informed him that they were unable to locate any such records. Again, appellants' inability to lay their hands on this documentation does not necessarily establish that Porter was not treated for a cyst.

In addition, appellants interviewed a variety of sources, from police officers to lawyers to Asians active in the Chinatown community, in order to explore Porter's charges and to understand the relationship between law enforcement and Asian youth in Chinatown. Appellants were also told by members of the police force that other Asian youths like Lee had been "framed" on false charges.

Appellants had some reason to doubt Porter's credibility. Manning had opined to Bergman that he had "some doubt" about Porter's veracity, although Bergman apparently constructed this remark as a comment on Porter's chances of being believed in court in view of his status as a convict. Bergman knew that Porter was concerned about the detainer and wanted assistance. In the text of the affidavit, Porter made some superficially outlandish claims that neither of the reporters took literally.[31] Ramirez also wrote a note to his superiors at the Examiner at the outset of his investigation indicating that Porter's statements should be viewed with "skepticism."

These questions about Porter did not rise to the level of "serious doubts." And in any event, they were largely dispelled as a result of the investigation undertaken in response to Porter's charges and appellants' subjective beliefs concerning the information they uncovered. The record as a whole supports the conclusion that at the time the articles were published, appellants did not possess a subjective awareness of probable falsity. (See *St. Amant, supra,* 390 U.S. at p. 731 [20 L.Ed.2d at p. 267].)

Finally, respondents posit that appellants were reckless by failing to reinterview Attorney Stanley Golde with whom Richard Lee had met to discuss a potential defense when he first learned he was being sought by the police in connection with the Leong homicide. Golde had told Bergman that the information he had about Lee would not be beneficial to the reporters. Bergman testified that he construed Golde's statement to mean that

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[31] For example, Porter claimed he had met with Merle "perhaps 30 times" for several weeks prior to trial in order to rehearse the written version of his trial testimony. Porter also stated that respondent McCoy promised him $35,000 in order to provide bail for Porter's girlfriend.

whatever information Golde had about Lee "might not be helpful" and could have been detrimental to Lee. The reporters decided that it was not in their interest to recontact Golde.

Assuming arguendo that respondents are correct when they speculate that Golde would have told appellants that Lee was guilty, this knowledge would not have seriously affected their view of Porter's veracity. Porter never told Bergman nor did he swear in the affidavit, that he knew Lee was innocent. Indeed, Porter declared in the first affidavit that Richard Lee would not talk about his case to Porter.

Respondents have never contended they were libeled by the articles's suggestion that Lee might be innocent. Their claim is based exclusively on Porter's published allegations. The "sting of the libel" (*Curtis Publishing Co. v. Butts, supra,* 388 U.S. 130, 138 [18 L.Ed.2d 1094, 1101].), was that respondents improperly procured Porter's testimony about Lee. This "sting" would have remained had appellants published the identical charges of official misconduct, but conceded Lee's guilt. Similarly, the fact that appellants might have had reason to believe Golde would tell them Lee was guilty bears little if any relationship to their subjective belief in Porter's veracity.

Appellants were not obliged to assure themselves beyond a reasonable doubt that Lee was innocent before airing charges of official misconduct. These charges were logically independent of his guilt or innocence.[32] Appellants' states of mind as to Richard Lee's guilt or innocence are not determinative of their subjective attitudes toward the truth or falsity of Porter's charges.[33]

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[32] Appellants were clearly motivated in part by a belief that Lee was "framed." But both reporters testified that a primary concern was the propriety of the overall process by which Lee was convicted. As Ramirez testified, "The questions that were being raised were newsworthy and needed to be reported regarless of [Lee's] guilt or innocence. . . ."

[33] Similar reasoning applies to Ramirez's failure to ask Lee about the bullets that were found in Joe Fong's car in which Lee was a passenger on the night he was arrested. Respondents claim that Ramirez's failure to question Lee about the bullets is clear and convincing evidence of Ramirez's recklessness toward the truth or falsity of Porter's charges.

Respondent Merle additionally contends that the information contained in the May 21st article about the State Bar disciplinary proceedings was published with actual malice. At trial, Merle's counsel argued that this portion of the article constituted a known falsehood in that (1) Hallinan had told Ramirez that the bar had decided not to impose sanctions, and (2) Ramirez completely fabricated his testimony that "additional information" led him to believe that the recommendation to impose sanctions had not been overturned.

Respondents were able to make these arguments because the trial court erroneously ruled that Ramirez could not testify that the source of his "additional information" was reporter Larry Hatfield. Hatfield had covered State Bar affairs for years and Ramirez considered him to be a reliable source.

During discovery Hatfield testified that he informed Ramirez that a disciplinary review committee had decided to impose "unspecified disciplinary action" against Merle. Hatfield had obtained this information from a qualified State Bar source. However, Hatfield refused to divulge his bar source.

Respondents obtained a commissioner's order that should Hatfield fail to disclose his source, it would be deemed established for purposes of this action that there was no such source. The trial court misconstrued the commissioner's order to include a ban on any mention of Hatfield whatsoever. Therefore, Ramirez was prevented from testifying not simply as to the existence of Hatfield's source, but also as to the existence of his own source, Larry Hatfield.

Article I, section 2, subdivision (b) of the California Constitution and Evidence Code section 1070 prohibit contempt proceedings against publishers, editors, reporters and others for failure to reveal their sources of information. Code of Civil Procedure section 2034 authorizes the court to impose reasonable sanctions

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However, there is no logical nexus between respondents' charge that Lee was involved in another homicide, and the substance of Porter's allegations. Moreover, Ramirez testified that he did not know until the trial in this case that the bullets found in Fong's car were of the same caliber as the bullets used in the other homicide.

against one who refuses to provide discovery or respond to appropriate questions during deposition.

This case presents the interplay between (1) a reporter's right not to divulge a source, and (2) those provisions governing the redress of wilful failures to disclose information during civil discovery proceedings. However, this court need not resolve the tension between these laws here. The commissioner's order clearly did not bar Ramirez from explaining that *he* had relied upon his source, Hatfield. Nor would there have been any logical basis for such a sweeping ban on Ramirez's testimony. Hatfield was the disobedient deponent, not Ramirez. Hatfield's confidential source at the State Bar was the object of controversy, not Ramirez's source. Ramirez did not refuse to disclose his source nor did he attempt to introduce evidence of Hatfield's source. The trial court erred in disallowing Ramirez's testimony that he had a source for the published statements.

When the May 21st article is evaluated in light of Ramirez's actual state of mind, it is clear that as a result of the information he received from Hatfield, Ramirez had reason to and did believe that a State Bar committee had decided to sanction Merle. Although respondents were allowed to argue that Ramirez invented this story, it was in fact based on a trusted source. No actual malice existed.

In *New York Times*, the high court refused to hold the publisher liable even though the Times would have discovered the falsity of the published material had they simply checked their own news files. (376 U.S. at pp. 287-288 [11 L.Ed.2d at p. 711].) In that case, the court affirmed that freedom of expression requires " 'breathing space' "—room for error—if it is to survive. (*Id.*, at p. 272 [11 L.Ed.2d at p. 701], quoting *NAACP v. Button* (1963) 371 U.S. 415, 433 [9 L.Ed.2d 405, 418, 83 S.Ct. 328].)

The Supreme Court recently reaffirmed the fundamental precept that error is inevitable in free debate and that even demonstrably false statements must be protected absent actual malice. (*Philadelphia Newspapers, Inc. v. Hepps* (1986) — U.S. —, — [89 L.Ed.2d 783, 793-794, 106 S.Ct. 1558, 1564-1565]; see *New York Times, supra*, 376 U.S. at p. 272 [11 L.Ed.2d at pp. 701-

702]; Barron & Dienes, Handbook of Free Speech and Free Press, § 61.1, p. 226.) The critic of official conduct is not compelled "to guarantee the truth of all his factual assertions" for "to do so on pain of libel judgments virtually unlimited in amount" results in self-censorship. (*New York Times, supra,* 376 U.S. at p. 279 [11 L.Ed.2d at p. 706].)

In light of these settled principles of constitutional law, this court concludes that appellants did not harbor actual malice when they published the articles containing false allegations of official misconduct involving respondents.[34]

V.

One additional issue that arose in the course of this trial must be addressed.

The jury was instructed in the modified language of BAJI No. 14.71 (6th ed. 1977) in pertinent part as follows: "If you find that plaintiffs suffered actual damages as a proximate result of the conduct of the defendants on which you base a finding of liability, you may then consider whether you should award additional damages against defendants, for the sake of example and by way of punishment. You may in your discretion award such additional damages, known as punitive or exemplary damages, if, but only if, you find by clear and convincing evidence that said defendants were guilty of oppression, fraud, or *actual malice in the conduct on which you base your finding of liability.*

" 'Malice' means a motive and willingness to vex, harass, annoy or injure another person. Malice may be shown by direct evidence of declaration of hatred or ill-will *or it may be inferred from acts and conduct, such as by showing that the defendant's conduct was wilfull* [*sic*], *intentional, and done in reckless disregard of its possible results.*" (Italics added.)

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[34] Since this court holds that the evidence did not establish actual malice, it is not necessary to reach the issue whether appellants were absolutely privileged under Civil Code section 47, subdivision 4, or the numerous remaining evidentiary claims.

This instruction was apparently based on Civil Code section 3294,[35] which provides guidelines for the imposition of punitive damages in civil cases. The trial court refused to instruct in the language of section 48a, which governs the award of punitive damages in newspaper libel cases. Section 48a, subdivision 4(d), defines "actual malice" for purposes of punitive or exemplary damages, as "that state of mind arising from hatred or ill will toward the plaintiff; provided, however, that such a state of mind occasioned by a good faith belief on the part of the defendant in the truth of the libelous publication or broadcast at the time it is published or broadcast shall not constitute actual malice."

In order to reach the issue of "actual malice" under section 48a for purposes of awarding punitive damages, the jury must first have found liability based on *New York Times* "actual malice." These two types of "actual malice" are very different.

The *New York Times* test "directs attention to the 'defendant's attitude toward the truth or falsity of the material published . . . [not] the defendant's attitude toward the plaintiff.' " (*Reader's Digest Assn. v. Superior Court, supra,* 37 Cal.3d at p. 257.) Actual malice under *New York Times* "is quite different from the common-law standard of 'malice' generally required under state tort law to support an award of punitive damages. . . . [C]ommon-law malice—frequently expressed in terms of either personal ill will toward the plaintiff or reckless or wanton disregard of the plaintiff's rights—would focus on the defendant's attitude toward the plaintiff[] . . . not toward the truth or falsity of the material published." (*Cantrell v. Forest City Publishing Co.* (1974) 419 U.S. 245, 252 [42 L.Ed.2d 419, 426-427, 95 S.Ct. 465].) " '[I]ll will toward the plaintiff, or bad motives, are not elements of the *New York Times* standard.' [Citations.]" (*Letter Carriers v. Austin, supra,* 418 U.S. at p. 281 [41 L.Ed.2d at p. 760].)

The punitive damage instruction in this case effectively dissolved the distinction between these two types of "actual malice." It did not require the jury to base its punitive damage award on a

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[35] All statutory references are to the Civil Code unless otherwise noted.

finding that defendants bore "hatred or ill will toward the plaintiff."[36] The jury was informed that it could base its finding of malice either on direct evidence of such hatred or ill will, *or* on intentional conduct or reckless disregard for the results of that conduct.

By the reference to and juxtaposition of "intentional conduct" and "reckless disregard," the instruction given was strikingly similar to that which the jury received regarding the determination of liability based on *New York Times* actual malice.[37] Therefore, the jury may well have confused the two phrases and improperly based its award of punitive damages on its finding of *New York Times* actual malice.

The danger of confusion was compounded by the use of the word "conduct" in the first part of the punitive damage instruction. The jury was instructed that it could award punitive damages if it found by clear and convincing evidence that the defendants "were guilty of . . . actual malice in the conduct on which you base your finding of liability." The flaw in this sentence is apparent. If the jury found liability based on appellants' conduct in publishing the articles with *New York Times* actual malice, it was then free to award punitive damages based on that same conduct. Such a result would eliminate the sharp distinction between the actual malice required by *New York Times* and that necessary to award punitive damages under section 48a.

This instruction should not have been given. However, it is not necessary to reach the impact of this error in light of the court's

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[36] Instead of tracking section 48a's definition of actual malice as "hatred or ill will toward the plaintiff," the instruction defined malice as a willingness and motivation to vex and harass which could be *shown* by direct evidence of hatred or ill will.

[37] The jury was instructed, in accordance with *New York Times*, that in order to find appellants liable, it had to find they published libelous statements about respondents, and that "at the time of the publication of said statements [appellants] knew the statements were false, or published or allowed the statements to be published with a reckless disregard of the truth or falsity."

finding that the record does not establish liability under *New York Times*.

VI.

In sum, this court holds under *New York Times* that the evidence does not establish with convincing clarity that appellants possessed actual malice when they wrote and published the disputed articles.

The judgment of the Court of Appeal is reversed with directions to reverse the judgment of the trial court.

Broussard, J., Reynoso, J., McClosky (Eugene), J.,* and Johnson (Earl) Jr., J.,* concurred.

Mosk, J., and Lucas, J., concurred in the judgment.

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* Assigned by the Chairperson of the Judicial Council.

APPENDIX A

SAN FRANCISCO EXAMINER
Wednesday, May 19, 1976
How lies sent youth
to prison for murder
Curious conviction
in Chinatown trial
By Raul Ramirez

On Nov. 1, 1972, Richard W. Lee, 19, was convicted of first-degree murder in what San Francisco authorities hailed as a major breakthrough in their attack on Chinese youth gangs.

Now, 3½ years later, an Examiner investigation has uncovered evidence that he was convicted on the basis of perjured and misleading testimony exacted by a prosecution that badly needed a conviction.

Lee is serving a life sentence at Deuel Vocational Institution in Tracy.

His conviction by a jury came after a series of widely publicized shootings that prompted then-Mayor Joseph Alioto to declare that the streets of Chinatown were nevertheless "the safest place in town for tourists and Caucasians." The mayor asked for immediate police action to make them safe for Chinese.

Lee's trial had unfolded in a city shaken by a succession of spectacular slayings among young Chinese and a degree of alarm echoed by the highest law-enforcement authorities in California. On the morning 12 jurors retired to decide Lee's fate, Bay Area newspapers quoted state Atty. Gen. Evelle Younger as telling a press conference in Sacramento:

"Chinese gangs are fast becoming serious threats in the state and other parts of the country in cities and towns having Chinese communities."

In San Francisco, where a string of more than a dozen killings spanning a two-year period had baffled police and frightened many in The City's growing Chinese community, a conviction

was viewed as a significant accomplishment. The guilty verdict in Richard Lee's trial was hailed as such in press reports.

The peculiar circumstances surrounding the Lee case, documented by the Examiner during a lengthy investigation, include:

• The testimony of a cellmate that Lee had confessed to the killing and boasted of his gang connections while awaiting trial. The cellmate, in a sworn statement obtained by the Examiner, says now that his testimony was fabricated by Lee's prosecutor. He says he was induced to testify under threats of violence and promises of leniency.

• The identification of Lee as the killer by a witness to the slaying. That witness, a 16-year-old girl, now swears she was never sure of the killer's identity but was rebuffed by prosecutors and police when she told them so. She says she agreed to testify against Lee only after being falsely assured that 11 other witnesses had also identified Lee. In fact, she and the cellmate were the two main pillars in the prosecution case.

• The assertion of another young witness, once a prime suspect in the slaying who was not prosecuted, that the killer was not Richard Lee.

(The San Francisco police homicide inspector who investigated Poole Yig Leong's killing declined to discuss the case. Pierre Merle, the prosecutor who obtained Lee's conviction, who is now employed by a New York investment firm, did not respond to several telephone requests to discuss the case with the Examiner.

Lee's conviction closed the file on the shooting death of Poole Leong, 22, a Hong Kong-born man who the state claimed was a key member of a gang at war with Lee and friends.

On June 13, 1972, Leong was standing outside a housing project apartment at 895 Pacific Ave. According to police reports and eyewitness testimony, Leong was shot while talking on a phone passed out of an apartment window at his request for an impromptu talk with a girlfriend.

Within hours after the shooting the discrepancies surrounding the Lee case began unfolding:

According to a police report prepared that night, "Suspect No. 1," the gunman, was a "Chinese male, 14-15 years, 5'3", skinny build, straight black collar-length hair." Richard Lee, a bank teller who was arrested 14 days later, was 19 years old at the time, 5'8", medium build. His hair was black and straight.

* * *

The prosecution version of what happened that summer night, and of the events leading to the shooting, was outlined during Lee's five-day trial before San Francisco Superior Court Judge Walter Calcagno four months later. The scenario was dramatic, yet simple:

Richard Lee, police intelligence officer Diarmuid Philpott testified, was a member of a gang of hoodlums headed by his close friend, Joe Fong. Fong's group and another youth gang, the Wah Chings (Young Chinese) were involved in a struggle for power and territory in which many had already died, Philpott told the jury.

The immediate motive for Leong's murder was described as retaliation for an attempted kidnapping of Fong's younger brother.

On the morning of the killing, Chung Way Fong, then 15, had been threatened by several youths affiliated with his brother's rivals, the Wah Chings. His assailants had approached him aboard a Muni bus headed for Marina Junior High School. They had shown him the handle of a gun protruding from someone's belt and asked for Joe Fong's whereabouts.

Then, they had pointed to a car driving in the opposite direction and told him it was Leong's. They ordered him to follow them off the bus and into the car. The young Fong eluded the youngsters as they left the bus. He told the bus driver, who reported the incident to Muni. The youth, later that morning, also reported the incident to school officials and police.

Prosecutor Pierre Merle theorized at Lee's trial that Leong's murder had been ordered after Chung Way Fong told his older brother of the incident early that evening.

* * *

Shortly after 10 p.m. that same night, Poole Leong strolled down Pacific Avenue and rapped on a ground floor window of apartment 31 at 895 Pacific, one of the buildings in the huge Ping Yuen federal public housing project.

A 16-year old girl came to the window and the two talked briefly. Leong then asked to speak with another girl and his friend dialed a number and handed him the telephone through the window. She walked back to join her younger sister and a neighbor. Her sister slept nearby on a living room couch.

The girl's 13-year old brother stepped out of the small apartment and joined Leong outside. The youngster sat on a wooden bench alongside the building while Leong stood next to the window, his back to a small patio area. The sunken patio was separated from the Pacific Avenue sidewalk by a hedge and wall. To reach the area, it was necessary to step down from a platform adjoining the sidewalk.

What happened next, at about 10:20 p.m. June 13, 1972, was described by the girl's brother:

Leong had been on the phone for about five minutes when "two guys came up from behind him and he turned around," the boy told homicide inspectors Frank McCoy and Edward Erdelatz two hours later.

The youngster identified one of the two, the one not carrying a gun, as Weyman Tso, then 16. Tso's grandparents lived across Pacific Avenue in another public housing project building. He had been involved in fights with the young witness and they knew each other well.

(In a statement obtained by the Examiner, Tso claims to have walked upon the shooting unaware of what was happening. Frightened, he went into hiding immediately after the incident and did not surface until he turned himself into police eight months later, after Lee's trial. He says Richard Lee, whom he knows well, was not the killer and that he did not recognize the gunman.)

In a taped interview with police, the girl's brother said he greeted Tso when the two youths walked up. He did not recognize the gunman, he said. Then, several shots rang out.

The youngster said he pulled his coat over his head as shots were fired. After the shooting was over he looked up and saw the two youths run away in the direction of another Ping Yuen project building, a highrise across Pacific Avenue. Several breezeways on that building's ground floor provide easy passage to Broadway's busy neon-lit strip.

At Central District police station on the fringes of Chinatown, the young witness later examined more than 100 pictures of youths whom police believed to be connected with gangs. Richard Lee's picture was among them. He did not pick it out. He did identify a picture of Tso.

* * *

When the shots were fired, the girl who had given Leong the phone thought they were firecrackers. Then she looked out the window and saw "two guys" standing outside for a split second. One held a gun in his right hand. She recognized the other one as Weyman Tso, a fact she promptly told police.

She told investigating officers McCoy and Erdelatz that she had taken "just one look" at the gunman, who looked like someone she had seen "a couple of years ago in Chinatown."

After a brief interview with the officers, she was asked to look at the photographs on file.

Her description of the gunman differed slightly from her brother's: She described him as a Chinese person in his early 20s, about 5 feet 6 inches tall—a "thin" man. Her brother described a man 5 feet 3, 14 to 15 years old. Police reports prepared that evening carried his description of the killer.

At 1:25 a.m. on June 14, three hours after Poole Leong was gunned down, her voice was recorded in still another talk with inspectors McCoy and Erdelatz.

Sounding tired and confused, she estimated the number of pictures she had looked at as about "6,000." The officers corrected her and she agreed that there were at least 100.

Softly, she said the man whose picture she had picked out was the man who had shot Poole Leong. It was Richard Lee.

For the next two weeks, Richard Lee reported to work as normal at the Civic Center Branch of the Wells Fargo Bank. Although a warrant for his arrest was issued on June 16, it was not until 11 days later, in the early morning hours of June 27, that he was arrested after a car in which he was a passenger was stopped for a traffic violation.

Two weeks later, on July 13, 1972, the girl testified at a preliminary hearing on the case. She seemed much less sure of the identity of the killer.

Asst. Dist. Atty. Martin Harband asked her about a police lineup the prior day, when she had identified Richard Lee as the man whose picture she had pointed out the evening of the murder:

Q. Did you pick someone out yesterday?

A. Yes.

Q. Who did you pick?

A. I say it looks like him.

At this hearing, the girl's uncertainty was clear. Unlike prosecutor Merle, Harband handled the preliminary hearing with no attempt to push her:

Q. . . . Did you pick Richard Lee yesterday?

A. I said it looks like him.

Q. It looks like who?

A. Richard Lee.

Q. O.K. Did you pick him out because he was the one you saw with the gun on June 13?

A. I said I am not sure.

Q. What are you sure about . . .?

A. I already told you.

The Judge. Try to repeat.

A. Like I feel guilty if I put the wrong person in.

Q. . . . did you see the face of the man who was holding the gun?

A. No. Not exactly . . . It looks like the picture I picked out but then I say I'm not sure.

Harband explored the subject of fear, one that the prosecution was to return to time and again in seeking to explain the girl's reluctant testimony. She had told police the night of the murder that she was frightened. Harband asked her to explain, and she responded:

"That night, I don't know. Like that night I was scared and everything and I was nervous, so, like I said, that night I remember what, but like I say, after I thought it over it doesn't seem to me like the same person when I tried to imagine him. That is what I told you."

Fear would become the central thrust of the prosecution's case against Richard Lee. From the outset, it sought to portray Lee as an awe-inspiring gangster whose self-assurance came from knowing that fear would silence prospective witnesses.

Several attempts were made to impress the jury with this aura of fear during Lee's trial.

At one point, the girl was questioned about fears of retaliation. A point was made that, after the shooting, a police watch of her home had been instituted at her parents' request.

This police concern was odd. The department stationed a police car outside her home for several weeks, day and night. But police did not provide any further protection while she went to school and moved freely, alone, about Chinatown.

No explanation was ever given as to why she and her brother would hesitate to identify Richard Lee, who was incarcerated, and

not the other suspect, who was still at large and presumably in a better position to carry out any revenge plans.

In a recent interview, the girl described how she picked out Richard Lee's picture the night of the murder:

"I went through a number of them (pictures). Then there were a couple of pictures, I say, uh, it could be him, or it could be him . . . I told them, well I wanted to go home badly but they said that I have to wait until I picked someone. I felt that I can't leave that room unless I find someone. . . . "

After returning home in the early morning hours, she lay in bed, unable to sleep:

"I was thinking, trying to think of what happened. I think of that picture and the guy that I picked out and I keep thinking, I go, no, God, what am I doing? . . . That wasn't him I picked out. I didn't really get to look at the guy that did the shooting."

When, later, she told police of her second thoughts, she was rebuffed: "They asked me, is it because I got a phone call or someone threatened me or this and that and that is why I changed my mind . . . I told them no. I didn't get no phone call" she said.

The inspectors sought to reassure her, the girl says:

"They said that there were 11 other witnesses, and I thought that what I had to say wasn't that important because I was a minor and there are 11 other witnesses, so I thought it was so that they told me that . . . I think, oh well, if there are 11 other people, witnesses, it must be him. Then what I've got to say isn't important."

Noting that prosecutor Harband accepted her statements at the pre-trial hearing with no attempt at channeling her testimony, she added: "Then (later on) the second guy (Pierre) Merle, told me he was pretty rough. He was yelling at me . . . He was pretty mean . . . He got very angry at me and I became very frightened of him.

"What I think is that he was angry at me because I was changing my story," she said.

At the lineup, she said, she balked at picking out the shooting suspect because "I'm not even sure it's him."

"And they go, 'OK, pick up the guy in the picture.'

"Therefore when I looked at the people in the lineup I picked out Richard Lee because it was he that I recognized as being the person whose picture I had picked out. That was easy to do because the five other perons in the lineup all looked different from Richard Lee, who was the shortest of the group."

The Lee trial experience, and the discovery afterward that she had been misled, has embittered her, she says.

"I thought police are very helpful and nice . . . I try to be helpful to them . . . But later on I don't think they are nice any more . . . they lied to me. That's what I don't like. I thought police couldn't lie and everything. Then another thing is that for someone to want to talk to they were, they were pretty mean."

She asked the Examiner to withhold her name, because, she said, she is embarrassed about having helped convict Lee in such a way.

* * *

San Francisco attorney Roger Ruffin who recently agreed to represent Lee, is using the girl's statements and other information uncovered in the Examiner investigation and elsewhere, and is preparing a writ of habeas corpus he expects to file on Lee's behalf in a few days in an attempt to obtain judicial review of the young man's case.

Ruffin, a former Superior Court judge in San Diego, says his review of the Lee case indicates he was wrongfully convicted:

"In my view, Richard Lee was victim of community hysteria regarding Chinatown's so-called Chinese youth gangs," Ruffin said.

The week preceeding Richard Lee's trial, attorney Patrick Coyle, the young lawyer assigned by the firm of James Martin MacInnis to defend Richard Lee, retired to a family mountain cabin. He now recalls he "ate good food, didn't drink, just getting ready" for the trial, which he thought was still 10 days away.

Coyle felt confident that the trial would result in Lee's acquittal. The prosecution's case, as outlined to him in discovery proceedings, rested mainly on the girl, a reluctant witness whose identification of Richard Lee was weakened by her own concern about putting the wrong person in prison.

The rest of the case against Richard Lee, he felt, was based on inneundo and guilt-by-association testimony from police officials.

Coyle returned to San Francisco the weekend of Oct. 22. The trial, he thought, was still a week away, set for Oct. 30. On Oct. 24, he wandered into the Hall of Justice to check up on another case and found, to his surprise, that the case of the People vs. Richard Lee had been rescheduled—for that day.

A message telling him of the change had been telephoned to his office the prior Friday. Patrick Coyle had not been in his office.

Although thrown off balance by this change, Coyle remained confident.

But he did not know that a new character waited in the wings, where he had been secretly primed and kept by Asst. Dist. Atty. Merle and Inspectors McCoy and Erdelatz.

That character was a most unlikely one, a surprise witness whose testimony proved devastating to Lee's case.

TOMORROW: The trial.

The Examiner inquiry into the Richard Lee case was made with the collaboration of Lowell Bergman, a free-lance investigative reporter aided by a grant from the Fund for Investigative Journalism of Washington, D.C.

D.A. promises 'full cooperation'

San Francisco Dist. Atty. Joseph Freitas says he will "fully cooperate" in any attempt to determine "through the established process" whether Richard W. Lee was wrongfully convicted in a 1972 Chinatown murder case.

Freitas' statement came after San Francisco attorney Roger Ruffin, a former San Diego Superior court judge, said he would seek a court review of the Lee case.

The district attorney was briefed by The Examiner last week about the content of a series of stories about the Lee case beginning in today's editions of the paper.

The stories include allegations that a former assistant to then-Dist. Atty. John Ferdon pressured one witness into giving misleading testimony and fabricated the testimony of another.

Freitas said his staff is reviewing the contents of his office's files in the Lee case, but has found no irregularities. He acknowledged that it would be highly unlikely that anyone committing improper actions would allow them to be reflected in official files.

"We will fully cooperate with the court in determining what the truth is," he said. "This office has an interest in seeing that justice was or will be done in this case."

Freitas vowed he would take legal or administrative action against present or past members of his office or of the police department who his investigation shows acted improperly or illegally.

The Examiner stories include allegations from two key witnesses who say they were pressured by former prosecutor Pierre Merle and police to give misleading or false testimony.

Merle, now an investment firm's lawyer in New York, did not respond to repeated requests to discuss the case.

Frank McCoy, a police homicide inspector who handled the Lee case, declined to talk about it with the Examiner. He said the trial transcript should "reflect on the facts of the case."

"There is no reason to get together," he told a reporter. "The case went to a jury before a competent judge. The proper way of handling it is to take it to the district attorney's office."

McCoy, whom other law enforcement people described as a well-respected investigator, said he knew "where these things (allegations) are coming from—from his brother."

Lee's brother, William, had protested the conviction shortly after the 1972 trial.

The Examiner stories, however, are based on an independent investigation and on interviews with witnesses and others close to the case.

Appendix B
San Francisco Examiner
Thursday, May 20, 1976
Chinatown murder:
Witness recants
By Raul Ramirez

A surprise awaited Richard W. Lee on Oct. 24, 1972, when he went on trial in San Francisco on charges that he killed another young man in a Chinatown gang assassination.

Lee, a 19-year-old bank teller, was accused of shooting Poole Yig Leong, 22, in what police said was retaliation for an attempted kidnaping of a gang leader's brother.

Until his five-day trial began before Superior Court Judge Walter Calcagno, the case against Lee seemed hollow.

It consisted of testimony from policemen who said Lee was a member of a youth gang dubbed the "Joe Fong gang" and would have had reason to kill Leong, whom they identified as a member of the rival "Wah Ching gang."

The sole evidence linking Lee to the killing was the hesitant identification of him as the gunman by a teenaged girl who initially said the killer "looks like" Lee.

But in the trial's opening session, Asst. Dist. Atty. Pierre Merle revealed that he would have another witness—a man who had been quietly primed for months by him and police homicide inspectors.

That man's testimony was to be crucial in Lee's conviction of first-degree murder five days later.

He was Thomas Porter Jr., also known as John Henry, a young black man from the Midwest then facing a desperate legal situation of his own. He would testify that Lee had confessed to Leong's murder during intimate talks while the two shared a cell in the San Francisco County Jail.

Porter's testimony also was used to explain the absence of other substantive evidence and the reluctance of an eyewitness to identify Lee positively as the killer.

Testifying for several hours, Porter described Lee as a cocky gang hit-man unafraid of conviction because his gang would scare away witnesses.

Porter claimed to know Swahili and Cantonese. He boasted of his familiarity with Chinatowns in San Francisco and Chicago and of having gained Lee's confidence.

Porter is now serving time at a federal penitentiary for an auto theft conviction that preceded his San Francisco stint. He is no longer under the jurisdiction of the city's district attorney's office.

In a sworn statement obtained by the Examiner, Porter now repudiates his testimony at the Lee trial. He says it was fabricated by prosecutor Merle and that he agreed to perjure himself only after he was threatened by police.

Porter's statement, coupled with the assertion of the key prosecution "identification" witness—the teenaged girl—that her testimony was colored by false statements told her by police, puts in question the manner in which the People of California obtained Richard Lee's conviction.

Lee's trial was staged at a time when a long string of unresolved killings among Chinese youths received strident media coverage and was the focus of concern among city officials. Some worried that reports of violence would affect tourism.

Police were baffled and embarrassed by youth violence. First fights had inexorably escalated into premediated (sic) killings, and all police could do was cite nefarious codes of silence and describe the inability of white officers to penetrate the Chinese community.

Then came the evening of June 13, 1972.

Poole Yig Leong, an unemployed man who hung around with immigrant Chinese youngsters, was gunned down as he spoke on a telephone that had been passed out an apartment window at his request in a Chinatown housing project building at 895 Pacific St.

Of the three persons who saw the killer, only one, a 16-year-old girl, tentatively identified Lee as the gunman. The girl's brother claimed he had not seen the killer's face. A third witness, a young man once considered a prime suspect in the incident, after the trial turned himself into police and was released without being charged. He says Lee was not the killer.

The girl's identification was hesitant. She says she was never sure that Lee was indeed the man she saw with the gun that night, but that she picked out his picture from a police file because Lee "looked like him" and because she thought she would be required to pick out a photograph before being allowed to go home.

But police to whom the girl had confided the night of the murder that she feared Chinatown's "gangs," interpreted her hesitancy as fear of retaliation if she testified against Lee. They dismissed her protests that she wasn't sure whether Lee was the killer.

Later, when investigating officers learned that the 15-year-old brother of youth gang figure Joe Fong had been threatened by several Wah Ching toughs on a Muni bus the morning of Leong's murder, they concluded that they had found a motive for the slaying.

Police theorized that Leong was killed in retaliation for that incident. Lee's name fit into that scenario, for Chinatown police knew Richard Lee as a friend of Joe Fong.

Lee was arrested two weeks later when, late one night, a car driven by Fong was stopped for a traffic check. Although Lee had reported to work each day at the Civic Center branch of the Wells Fargo Bank, where he had worked for nearly a year, police had not located him until the morning of June 27, 1972.

Earlier that night, Chinatown youth worker Barry Fong Torres had been murdered in still another highly-publicized slaying. Police hinted—and San Francisco's newspapers dutifully reported—that Lee's arrest may have solved that murder. (The Fong Torres killing, however, remains unsolved.)

Richard Lee and Thomas Porter met shortly after Lee's arrest. The two became acquainted when Porter came to Lee's aid at the

San Francisco City Jail when a deranged prisoner seemed about to jump on the Chinese youth.

Porter was to testify later, that this incident spawned an unlikely friendship, which resulted in Lee confiding that he had killed Poole Leong, that he had played key roles in other Chinatown murders and that he was a member of a gang which would silence any prospective witnesses.

A few days after Lee and Porter met, Lee was transferred to the county jail one floor higher in the Hall of Justice complex at 850 Bryant St. He had been unable to post the $100,000 bail set by Judge Claude Perasso at a preliminary hearing.

Porter, then 21, had been apprehended in San Bernardino with his girl friend shortly after commandeering a taxicab and its driver in San Francisco.

In and out of jail since he was 16, Porter faced four major felony charges; robbery, assault with a deadly weapon, kidnapping and manufacturing prohibited weapons for sale.

His situation was desperate. Far from his native Oklahoma, he was wanted by federal authorities for escaping from El Reno Federal Penitentiary there, where he had been serving a sentence for auto theft. A combination of the California and federal penalties could have put him away for life.

Then, he was assigned to the cell at the city jail with Richard Lee. A few weeks later, after Lee had been taken upstairs to the county jail, Porter joined him there—again in the same cell. The two shared a 10-by-12-foot living area with 10 other men through the summer and early fall of 1972.

During those months, Porter testified later, they became friends—the San Francisco-born young Chinese-American and the black man from Oklahoma.

As early as August, 1972, Porter had developed other acquaintances, whom he saw repeatedly. They were prosecutor Merle and homicide inspectors Frank McCoy and Edward Erdelatz. In a series of meetings in the Hall of Justice complex, they assembled the prosecutions's master stroke against Richard Lee.

Richard Lee was a shaken young man when he was ordered to stand trial for the murder of Poole Yig Leong. A July preliminary hearing had surprised him. He had expected to see the charges against him dropped because he believed his arrest to have resulted from mistaken identification or from what he viewed as routine police harassment of Chinese youths.

Shocked by the high bail, he became wary of everyone. Several of his cellmates testified that he was uncommunicative. Even his lawyer, Patrick Coyle, remembers him as "paranoid," reluctant to discuss any aspects of his life in the county jail's interview rooms because he believed he was the victim of a conspiracy.

It was this attitude that made Porter's testimony that much more incongruous to Coyle when it came to the trial.

Coyle scored a point or two by bringing other cellmates to the witness stand to testify about how Porter had told them they could get lenient sentences if they "cooperated" with prosecutors and helped police put together cases against others. None had heard Lee discuss his case with Porter or with anyone else.

(Lee says his stock answer whenever asked by his cellmates, including Porter, about the charges against him was, "That's what they say. That's what they say.")

Coyle's request at the trial that an interpreter be summoned to test Porter's purported fluency in Cantonese was denied by Judge Calcagno.

Porter's testimony was devastating. After befriending Lee, he said on the witness stand, the young man confessed to the murder, told him he had buried the murder gun and that members of his gang had dug it up after his arrest, broken it up into pieces and thrown it into "lakes" around San Francisco.

He testified that Lee had repeatedly boasted about his gang affiliations and the strength of their influence.

Porter told the jury he had voluntarily sought out police agents after Lee's disclosures. He declared he had not been threatened by anyone or offered leniency by police or prosecutors. To buttress his testimony, prosecutor Merle introduced as evidence a piece of

paper on which Lee had written the name of Joe Fong's brother, Kit Fong, and a telephone number.

Porter testified that Lee had given him Fong's name and number as a possible contact if he wanted to buy weapons when he left jail.

(Lee says Porter had asked him for the name of someone who could help him find a job if he got out of jail. Fong, then counselor at a San Francisco youth program, was a logical choice, he says.)

Porter's startling testimony overshadowed the uneasy, shaky identification by the teenaged girl. It even helped explain her hesitation.

Porter's declarations were augmented by the testimony of Terry Sullivan, the policeman who headed the Police Activities League's youth hall in Chinatown, and Sgt. Diarmuid Philpott, whom Merle introduced as an expert on Chinatown youth.

Philpott, a long-time Chinatown policeman who is now in the department's intelligence squad, testified that Lee was a "right hand" lieutenant of Joe Fong. He described Leong as a high ranking cohort of Wah Ching leaders.

Sullivan testified that he had once seen Lee at a gun firing range, where the officer had taken other Chinatown youngsters for target practice. Lee was holding a handgun, Sullivan testified. He did not say (and was not asked) that many Chinatown youths visited the gun range regularly as guests of police.

At 9:30 a.m. (Nov. 1, 1972) the seven women and five men who were to decide Richard Lee's guilt or innocence retired to deliberate. Six and a half hours later, their verdict was in: Guilty, first degree murder. Twenty-one days after that Lee was sentenced to life in prison.

The day after Lee's conviction, San Francisco's newspapers reported unnamed police officials hailed the jury's judgment as a breakthrough—the first conviction in a Chinatown youth gang warfare case.

TOMORROW: The "case" against Richard Lee breaks down.

APPENDIX C

San Francisco Examiner
Friday, May 21, 1976
juror's anguish:
He wept as he voted guilty

When he voted to convict Richard W. Lee of first-degree muder three and-half years ago, Ivan Wright cried.

"It broke me up," he recalls now. "I cried like hell when I had to give this verdict."

His sorrow, Wright said, came from a nagging "emotional" doubt that Lee may not have been the man who killed Poole Yig Leong on the evening of June 13, 1972.

Lee was sentenced to life imprisonment for the killing, which police attributed to Chinatown youth gang warfare.

Wright, a retired hotel deskman and auditor, said he was bothered first by the testimony of a cellmate who claimed that Lee had confessed to the murder while awaiting trial.

"I knew that he was full of baloney," Wright said. "I don't think anybody paid attention to his testimony. He was in the slammer. He had reason to give a story."

Then, Wright added, there was the testimony from an eyewitness to Leong's killing, who hesitantly said that Lee was the man who shot Poole Leong.

"I had my doubts and a couple others (jurors) did," Wright said. "Neither attorney (defense or prosecution) ever said to that girl, 'Is the man who did the shooting in this courtroom right now?' I had mixed feelings, feelings that have always haunted me since then."

Wednesday, when Wright read an Examiner report of how both the cellmate and the young eyewitness, a 16-year-old girl at the time of the trial, now say they tailored their testimony to suit the prosecution because of pressure from authorities, he cried again.

"My conscience is killing me," he said in a telephone call to the Examiner.

"When we first went to deliberate, I wrote a question mark on the first ballot. That girl . . . I didn't exactly believe her . . . but when they read it back in the transcript (at his request) it sounded pretty good when written down. I had my emotional doubts. I'm even more heart-broken now," he said.

He said a majority of the jurors had been in favor of conviction from the outset, but he and a few others held out.

"I had a sixth sense that that wasn't right. She had answered so vaguely (when asked to identify Lee as the killer). And where do you separate reason from emotion?"

Finally, after several hours of debate, Wright agreed to a guilty verdict.

"I had to go along with the verdict finally," he said. "The instructions from the judge on reasonable doubt were to decide the case on the factual information. But it bothered me."

"I was sad, to come to a verdict like that. Had it been a capital case I couldn't have, I never would have voted for a conviction.

"That's why I am against capital punishment. God, if we ever make a mistake, how are we going to rectify it?" he asked.

The Examiner's report of how the two key witnesses admit to having given false or misleading testimony troubled him, Wright said.

"I'm all for law and order, but, my God, this is not law and order," he said.

"We might have law and order, but not by putting innocent people in jail," he said.

Chinatown Murder
How witness
was coerced
By Raul Ramirez

"I falsely testified in The People v. Richard Lee."

With this opening, Thomas Porter Jr., the man whose testimony may have sealed the murder conviction of Richard W. Lee

three years ago, swears now that he lied to keep the young Chinese-American behind bars.

Porter, now a federal prisoner, claims he lied because of police threats against him and his girlfriend.

On Nov. 1, 1972, Richard Lee, then 19, a San Francisco bank teller, became the first person convicted of murder in a wave Chinatown youth gang killings.

Porter's admission that he lied as a witness, along with other information obtained by The Examiner during an investigation into the Lee case, indicates that the young man was convicted on the strength of misleading and perjured testimony.

Porter's testimony, which he now repudiates, was the cornerstone of an otherwise weak prosecution case: He testified that Lee had confessed to the murder while the two shared a cell in the San Francisco County Jail while awaiting their respective trials.

Porter's assertion the Lee had boasted of his gang connections and of how they would scare away witnesses helped explain the absence of other substantial witnesses. The jury apparently believed him.

Porter says now:

"The truth is that Richard Lee never told me any such thing, nor did he ever say anything to me or in my presence about any murder or any crime, other than to say what he was charged with by way of explaining why he was in jail," Porter declares in a sworn statement given from a federal penitentiary.

Several weeks after he met Lee at the San Francisco City Jail in July, 1972, Porter says, he was summoned by a robbery detail police officer to the department's homicide squad.

An escaper from a federal penitentiary at the time, Porter faced kidnaping, robbery and assault charges in connection with an abduction of a San Francisco taxicab driver.

The officer and others alluded to additional charges that could be filed against Porter, then talked about Richard Lee, Porter claims in his affidavit.

"They said they knew he was in the same tank as I was and that they had purposely had me and him put in the same tank because they wanted information from Lee," Porter says, "They said they wanted something to convict Lee of murdering a Chinaman . . ."

Lee was awaiting trial on charges that he had killed a 22-year-old Chinese man in retaliation for the attempted kidnaping of the brother of a gang boss.

After the initial meeting, Porter said, he was taken to several session with Pierre Merle, the assistant district attorney prosecuting Lee, and with police homicide inspectors.

"When I first met with Merle he gave me a written story that he told me to learn so that I can give it as testimony against Richard Lee," he said. "Mr. Merle had me recite the story for him over and over and he told me how I should testify. Mr. Merle always took the written story back from me at the end of the meetings.

"My lawyer, Cyril Weeks of the public defender's office, was never present for these meetings, but he knew of them." (Weeks, in a recent interview, said he remembered little about Porter's case, but recalled knowing that Porter held several meetings with police officials.)

Porter adds: "I agreed to give the false story that Pierre Merle gave me at Richard Lee's trial because of threats and promises made to me by Officer (police homicide inspector Frank) McCoy and his partner. They repeatedly promised me that if I gave the story prepared for me . . . I would not have to serve any time in California.

"They promised me that the woman I loved . . . who, pregnant, was being held in jail on the same charges . . . would be set free after a brief period of observation.

"When I refused to go along with the story that had been prepared for me to give as testimony . . . despite the promises . . . Officer McCoy and his partner, a blond man, 29-30 years old, of medium build, threatened me with bodily harm and death. McCoy and his partner took me on an elevator not far from

homicide and McCoy's partner drew his revolver and said that I would testify or my people would never see me again . . . McCoy's partner then hit me behind and below my ear, causing it to swell but leaving no mark.

"I did not agree to give the false testimony that had been made up for me against Richard Lee until my life was threatened . . ."

* * *

Former prosecutor Merle did not respond to telephone requests from The Examiner to discuss the Lee case. McCoy declined to discuss the case because, he said, it was decided by a jury "before a competent judge." He suggested that allegations of misconduct, if any, be taken to the district attorney's office.

Dis. Atty. Joseph Freitas, apprised of the content of Examiner stories concerning the case, said he would review his office files and promised to cooperate fully in a judicial review. San Francisco attorney Roger Ruffin, a former San Diego Superior Court judge who now represents Lee, says he will soon seek such a review.

* * *

Not long after Lee's conviction, Porter was convicted of armed robbery in San Francisco. He was sentenced to five years to life after authorities noted that he had cooperated in Lee's case. His term was to run concurrent with his federal sentences for auto theft and escape.

Porter's girlfriend was released on parole and later disappeared in violation of the terms of her release. She is now a fugitive.

Porter was later transferred to a federal penitentiary in the Midwest, where he is now is imprisoned. But the Lee case remained in the back of his mind, he says, as a troublesome recollection.

Early last year, in the course of checking with the principals in the Lee case, The Examiner contacted Porter in prison. He welcomed this as his first opportunity since Lee's trial to tell the story behind his testimony.

Later, an attorney volunteered to take an affidavit from Porter. The above statements were quoted from that document.

* * *

Through the entire trial ordeal, Lee had protested that he was innocent. The night of the murder, he told The Examiner, he had eaten dinner at an apartment he shared with a friend in the Sunset District, then joined others to attend a friend's graduation from Opportunity High School at the Lowell High School auditorium.

After the ceremony, he says, he drove to a house in the Ingleside District into which he and friends were in the process of moving, watched the others play cards for a while, then retired to sleep.

In separate interviews, the youngsters whom Lee cited as his companions that night confirmed his account.

This alibi was never presented to the jury. Lee's attorney, Patrick Coyle, told The Examiner he had asked a friend of Lee to contact witnesses and ask them to get in touch with him but that this was never done. Coyle says he felt that the testimony of teenagers, many of whom had been labeled by police as gangsters, would have done little to sway the jury.

Lee's defense was hampered by another factor. Coyle did not find out about Porter's role as a witness until after the trial was under way.

The attorney protested to the judge that he did not have time to check Porter's background and reliability, but was turned down by the jurist when he sought a postponement.

* * *

In earlier reports, The Examiner detailed how the sole "identification" witness who testified that Lee was Leong's killer had sought to tell police that she was not sure that the gunman was indeed Lee.

That witness swears she was told by police that 11 other persons had identified Lee. Not until after the trial, she says, did she learn hers was the only "identification" of Lee as the killer.

The Examiner also has located another young man identified as being at the Ping Yuen public housing project when Leong was gunned down. That young man, once sought by police as an accomplice in the killing, says he walked upon the incident by chance. He affirms that the killer was not Richard Lee.

Still another law enforcement barrage against Richard Lee was delivered through senior probation officer Richard Silva.

Silva preparted a report recommending that Lee be sent to prison for the maximum term.

* * *

After being processed through California's prison intake system, Lee was assigned to Deuel Vocational Institution, the medium security prison in Tracy.

While appeals of his conviction prepared by volunteer lawyers have winded their way through the court maze, and have failed, Lee has quietly bided his time. He is currently enrolled in vocational training courses at the prison and works in the institution's warehouse as a stock clerk. Prison authorities described his conduct as excellent.

Pierre Merle, the man who led the effort to convict him, is now an investment firm's lawyer in New York City. He left a controversial prosecutorial career here.

(Months ago, a state Bar panel recommended that sanctions be taken against Merle for alleged misconduct involving a 1973 Chinatown case. A qualified state Bar source said that a disciplinary review committee has decided to impose unspecified disciplinary action against him. State Bar officials, for the record, said that there has been no official action taken concerning Merle.)

Says Lee, from the prison compound:

"The way I see it, they put me here according to their law of the land. I can't fight it because they've got me in a situation where if you fight it, they'll just get you more, lock you up, charge you . . .

"I have resigned myself right not to being here."

Despite a feeling that he was wronged by a legal system seeking scapegoats, Lee says he remains strong in spirit:

"They've got my body in here. Physically, they've got me but my mind is still free. As long as my mind can still function freely and think what I want to think and feel what I want to feel, it's OK. I'll make it."

Appendix D

AFFIDAVIT OF THOMAS HENRY PORTER, JR.

Thomas Henry Porter, Jr., upon his oath, attests:

1. At times I have used the alias John Henry.

2. I am a prisoner at the Terre Haute Federal Penitentiary Department of Prisons #36108-115, and I am serving a sentence of 0-6 years for interstate transportation of a stolen vehicle imposed by the Eastern District of Missouri. I am under a detainer from the State of California for a sentence of 5-life for armed robbery. I am under a sentence from the District of Kansas for 2 years for escape.

3. On October 30, 1972 I testified in the case of People v. Richard Lee being tried before Judge Ertola in Superior Court, San Francisco, California.

4. Some of my testimony in the trial of Richard Lee on October 30, 1972 was not true and I knew it was not true when I gave it. I gave false testimony in Richard Lee's trial because my life had been threatened by officers of the San Francisco Police Department while I was a prisoner in their custody and because promises were made to me by those officers and by the district attorney's office in San Francisco that in exchange for my false testimony against Richard Lee, I and the woman I loved would receive light treatment on the serious charges then pending against both the woman and myself, as I shall explain further in this affidavit.

5. I testified falsely in People v. Richard Lee that I spent my childhood in Chicago, that I lived on the Southside of Chicago, that I spent 2-3 years in the Chicago area, that I traveled from the Southside of Chicago to Chinatown there often to learn the art of self-defense, that I worked with a fellow who hauled trash in Chicago, that I stayed in Chicago for as long as 8-9 months, that I went from Kansas City to Chicago when I was 16 and have been going back and forth from Kansas City to Chicago, that I used to mow lawns and stuff in Chicago, and that I learned Swahili from people from the Virgin Islands in Chicago. The truth is that I have never been in Chicago in my life.

6. I testified falsely in People v. Richard Lee that I could speak Cantonese and that I can understand Cantonese. The truth is that I have never been able to speak or understand Cantonese.

7. I testified falsely in People v. Richard Lee that Richard Lee told me that he did not know if he was going to be convicted of anything; that he was not sure whether he would be convicted because he did not feel that a girl that the People were trying to get to testify would testify for the People because his gang members had talked to her and his people; that Richard Lee told me whether or not he had committed the murder with which he was charged; that I had other conversations about the murder with Richard Lee after we were bound over; that he was surprised that the girl testified; that he was surprised that the girl testified because of the threats issued to the girl and her family if she was to testify and that he would come back on appeal after and something would happen to her; that Richard Lee told me how he committed the crime; that Richard Lee told me that he was in Chinatown, around Pacific Street, that the guy was on the telephone, and that he killed this dude for the reason he had got in an argument with his gang members; that Richard Lee mentioned the guy on the telephone; that Richard Lee told me that he just shot the guy while he was talking on the telephone; that Richard Lee told me why he was the one who killed this man—because he was wishing there was more fellows in the gang, but he felt as though they were afraid and not qualified to pull the trigger, so that Richard Lee was appointed as the one to kill this man; that Richard Lee mentioned Kit Fong in reference to who appointed him. The truth is that Richard Lee never told as any such things, nor did he ever say anything to me or in my presence about any murder or any crime, other than to say what he was charged with by way of explaining why he was in jail. Richard Lee wrote Kit Fong's name on an envelope and he told me that I could reach him, Richard Lee, through Kit Fong, if I wished.

8. I falsely testified in People v. Richard Lee that Richard Lee had occasion to talk to me about any organization to which he belonged; that Richard Lee told me he was a member of the Ching Wah Yee Gang, that the gang extorted people up and down Chinatown, and that he could shoot a person in Chinatown;

that Richard Lee told me how this gang operated, what they did, and what they could do; that Richard Lee told me that he could pull the trigger and kill somebody in Chinatown and he would not get sent to the penitentiary for it because nobody would testify against him because of fear that something may happen. The truth is that Richard Lee never told me any such things and he never told me anything about any organization that he belonged to.

9. I falsely testified in People v. Richard Lee that Richard Lee had told me that a symbol in a newspaper picture of where he lived showed 2 people being arrested and that Richard Lee told me that one of the gang members lived in the house pictured or that Kit Fong lived there. What he told me was that the newspaper captiom said that 2 people had been arrested there.

10. I falsely testified in People v. Richard Lee that Richard Lee told me what he did after he shot the man on Pacific Avenue on the telephone; that Richard Lee told me he buried the gun, went to his mother;s house, and then went to make preparations for an attorney; that Richard Lee told him that since Richard Lee had been locked up some of his members disposed of the gun, dug it back up because it could have been seen where they buried it, and were supposed to have cut it up into different pieces and scattered it into one of these lakes; that Richard Lee had told him he had buried the gun where it could be seen. The truth is that Richard Lee never told me any such things and that he never had anything to say about his case to my knowledge.

11. I falsely testified in People v. Richard Lee that Richard Lee told me that he was not worried about his murder charge and that he felt the witness would not show up, and that Richard Lee told me that witnesses had been threatened. The truth is that Richard Lee never told me any such things and that he never talked about his case to my knowledge.

12. While I was in the county jail in San Francisco awaiting trial on charges of armed robbery, kidnapping, and possession of a sawed-off shotgun, approximately 3 months after I met Richard Lee in the city jail in San Francisco, I was forced to accompany Officer Casey of the robbery detail of the San Francisco Police

Department to homicide. Officer Casey told me they had another robbery charge. At homicide Officer Casey and another officer of the San Francisco Police Department whose name is unknown to me began talking about Richard Lee. They said they knew he was in the same tank as I was and that had purposely had said they wanted something to convict Lee of murdering a Chinese man whose mane is unknown to me. They said Richard Lee had killed the Chinese man in a telephone booth down on Powell or Pacific Street in San Francisco. They told me the date on which the man was killed, which I cannot remember, and they told me that a gun of an unspecified type had been used to kill him. They said the gun had not been found and that it had been taken from the scene of the crime and broken into pieces into deep water. They told me to say that Richard Lee had told me he could kill anyone in Chinatown without worrying, and they told me to say that I could speak Cantonese, as I could not. At this time Richard Lee had not told me that he had killed anyone and he had not confessed any crime to me. In fact, Richard Lee would never talk about anything important and he would not talk about his case.

13. After the meeting with Officer Casey and the other officer at homicide I was forced to meet repeatedly, perhaps 30 times, with Pierre Merle of the district attorney's office, by officers of the San Francisco Police Department. When I first met with Merle he gave me a written story that he told me to learn so that I could give it as testimony against Richard Lee. Mr. Merle had me recite the story for him over and over and he told me how I should testify. Mr. Merle always took the written story back from me at the end of our meetings. The meetings took place at homicide until I was transferred from the county jail in San Francisco to different outlying jails in the 6 weeks before Richard Lee's trial. Sometimes Officer McCoy of the homicide detail of the San Francisco Police Department or his partner, whose name is unknown to me, or both of them, would be present at my meetings with Mr. Merle. My lawyer, Cyril Weeks of the Public Defender's Office, was never present for these meetings, but he knew of them. As Richard Lee's trial neared, my recital of the written story given me by Pierre Merle was tape recorded to make sure that I knew it and could deliver it the way Mr. Merle wished.

15. I agreed to give the false story that Pierre Merle gave me at Richard Lee's trial because of threats and promises made to me by Officer McCoy and his partner. They repeatedly promised me that if I gave the story prepared for me at Richard Lee's trial I would not have to serve any time in California on the would not detain me when I had completed my federal sentences from which I had fled. They promised me that the woman I loved, Sybil Kenney, who had been arrested with me and who, pregnant, was being held in jail on the same charges as had been laid against me, would be set free after a brief period of observation and would not have to serve any time. When I refused to go along with the story that had been prepared for me to give as testimony against Richard Lee despite the promises that things would be much easier for me and Sybil Kenney, Officer McCoy and his partner, a blond man, 29-30 years old, of medium build, threatened me with bodily harm and death. McCoy and his partner took me on an elevator not far from homicide and McCoy's partner drew his revolver and said that I would testify or my people would never see me again, that it was election time and they needed a conviction. McCoy's partner then hit me behind and below my ear, causing it to swell but leaving no mark. At the same time McCoy's partner kicked me in the tail, which has a cyst on it, causing it to swell and bleed, and afterwards I could hardly walk for 2-3 days. I was treated for the kick at the county jail hospital. During this same time I became aware that Sybil Kenney was being abused in jail, as by being thrown in the hole when she was pregnant.

16. I was promised by Officer McCoy and by Pierre Merle that I would serve no time in California on state charges and that I would be given a float out of California and would not have to come back there. Pierre Merle said that he had talked to people in Sacramento and that I would not have to come back to California. I received a letter from my public defender, Cyril Weeks, telling me that he been present with Pierre Merle, Officer McCoy, and McCoy's partner when Pierre Merle had called Sacramento. Officer McCoy promised me enough money to make Sybil Kenney's bond, which I believe was $35,000.

17. I did not agree to give the false testimony that had been made up for me against Richard Lee until my life was threatened by Officer McCoy and his partner.

18. I was threatened by Pierrre Merle with charges of robberies that he knew I had not committed.

19. When I testified against Richared Lee on October 30, 1972, I had no trust is the law, and I believe to this day that if I had not testified, falsely against Richard Lee as I was told by the police officers and the prosecutor to testify, I would not be alive today.

20. On the day I testified against Richard Lee, October 30, 1972, before I testified, I was told by my public defender, Cyril Weeks, that no detainer would be placed on me by California.

21. I met with Pierre Merle on the day I testified against Richard Lee, October 30, 1972, for 2-3 hours. Just after I testified I met with Pierre Merle at homicide in the presence of Officer McCoy and his partner, when Pierre Merle told me that I had forgotten to testify that Richard Lee considered himself extremely dangerous and hoped to be head of the Wah Chang Gang, and that if he did he would control Chinatown. Pierre Merle told me that I had testified well.

22. About a week after I testified against Richard Lee. I and Sybil Kenney were tried and convicted in Superior Court, San Francisco, I of first degree robbery and she of second degree robbery. I was sentenced to 5-life to run concurrent with the federal sentences I have mentioned, and Sybil Kenney was sentenced to 1-life. Sybil Kenney was not released after brief observation. Thus some of the promises that were made to me by the People in exchange for my false testimony against Richard Lee were kept. The detainer from California still hangs over me.

So I betroth.

Date: 7-23-75.

THOMAS HENRY PORTER, JR.
THOMAS HENRY PORTER, JR.

Thomas Henry Porter, Jr. subscribed the foregoing affidavit of 6 pages after reading each page and making any corrections he desired and after signing each page in the margin and initialing each correction, before me at Terre Haute Federal Penitentiary, in the State of Indiana, on July 23, 1975.

ALICE M. MANNING,
Notary Public, Indiana
My Commission Expires
January 13, 1979

Appendix E

[174 Cal.App.3d 892]

[No. A011833. First Dist., Div. Five. Oct. 23, 1985.]

[As modified Nov. 22, 1985.]

Frank McCoy et al.,
Plaintiffs and Respondents,

vs.

Hearst Corporation et al.,
Defendants and Appellants.

OPINION

HANING, J.—Defendants/appellants Hearst Corporation, publisher of the San Francisco Examiner (together, Examiner), and its reporters Raul Ramirez and Lowell Bergman (collectively appellants) appeal from a libel judgment against them in favor of San Francisco Police Officers Frank McCoy and Edward Erdelatz and former Deputy District Attorney Pierre Merle (collectively respondents). Each respondent was awarded $500,000 compensatory damages and $500,000 punitive damages against the Examiner, and $250,000 compensatory and $10,000 punitive damages against Ramirez and Bergman each.

The judgment was based on a series of articles published in the Examiner under the byline of Ramirez, assisted by Bergman.[1] In substance, the articles charged respondents with intimidating and threatening witnesses and subornation of perjury in the criminal trial of People v. Richard Lee. Lee was convicted in San Francisco in 1972 of the first degree murder of Poole Leong, a Chinese youth, allegedly because of ongoing disputes between rival youth gangs in San Francisco's Chinatown district.

The key prosecution witness in Lee's trial was Thomas Henry Porter, a convicted felon and Lee's former cellmate. Porter testified that Lee admitted Leong's murder to him when the two of them were in jail together awaiting their separate, unrelated

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[1] The articles are appended hereto in chronological order as appendices A through C, inclusive.

trials. The published articles charged that Porter's testimony during Lee's trial was false, that respondents knew it to be false and that respondents engaged in threats, physical coercion and bribery to force Porter into testifying falsely in order to obtain Lee's conviction.

Approximately two years after the trial Lee's brother approached Bergman, a freelance reporter, about investigating the events surrounding the case. Bergman became interested and during the course of his investigation located Porter in a federal prison in Indiana. He wrote Porter and advised him he was a "journalist and researcher investigating the murder trial of Richard Lee." He also stated: "In addition, I am interested in your own history and present status." He asked Porter to call him collect.

Porter responded by telephoning Bergman and the two arranged for Bergman to visit Porter in prison. Bergman thereafter met with Porter in January 1975. The substance of their conversation and the manner in which a statement was obtained from Porter forms the basis for the judgment below. Respondents claimed that Bergman persuaded Porter to sign a false affidavit wherein Porter stated that his testimony during the Lee trial was false, was induced by beatings and threats to his life by McCoy and Erdelatz, by promises from respondents of leniency for his girlfriend who was also facing charges at that time, and a concurrent sentence on his own charges. Porter also swore in the affidavit that Merle prepared a written script of his false testimony which he was required to memorize and relate to the jury. Respondents further claimed that Porter's affidavit was obtained through promises by Bergman to have a California detainer on Porter removed.[2]

In April 1975, Bergman persuaded the Examiner to publish a story about the Lee case and the roles of Porter, Merle, McCoy

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[2] A detainer is a hold placed on a prisoner serving a sentence in another state or in a federal prison, for the purpose of securing the prisoner's return to the detaining state upon his release. In this case Porter was being detained to serve an additional sentence imposed by California.

and Erdelatz therein. Ramirez, an Examiner staff reporter, was assigned to write the story and Bergman was to have exclusive responsibility for obtaining Porter's version of the facts. Bergman obtained an attorney in Indiana, John Manning, to visit Porter and secure a signed affidavit in which Porter related the defamatory allegations.

The articles were published in the Examiner on May 19, 20 and 21, 1976. In addition to the charges that respondents conspired to suborn perjury, the articles also stated erroneously that Merle had been disciplined by the State Bar in connection with a separate matter. Respondents demanded a retraction pursuant to Civil Code section 48a,[3] but received no response.

After Lee's petition for habeas corpus was filed seeking relief on the basis of Porter's affidavit, the People obtained a second affidavit from Porter in which he recanted his initial affidavit for Bergman and reaffirmed his testimony given during the Lee trial. He admitted he signed the initial false affidavit at Bergman's

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[3] Civil Code section 48a states, in relevant part: "1. In any action for damages for the publication of a libel in a newspaper, or of a slander by radio broadcast, plaintiff shall recover no more than special damages unless a correction be demanded and be not published or broadcast, as hereinafter provided. Plaintiff shall serve upon the publisher, at the place of publication or broadcaster at the place of broadcast, a written notice specifying the statements claimed to be libelous and demanding that the same be corrected. Said notice and demand must be served within 20 days after knowledge of the publication or broadcast of the statements claimed to be libelous. [¶] 2. If a correction be demanded within said period and be not published or broadcast in substantially as conspicuous a manner in said newspaper or on said broadcasting station as were the statements claimed to be libelous, in a regular issue thereof published or broadcast within three weeks after such service, plaintiff, if he pleads and proves such notice, demand and failure to correct, and if his cause of action be maintained, may recover general, special and exemplary damages; provided that no exemplary damages may be recovered unless the plaintiff shall prove that defendant made the publication or broadcast with actual malice and then only in the discretion of the court or jury, and actual malice shall not be inferred or presumed from the publication or broadcast. . . . "

request in exchange for Bergman's help in removing the hold imposed by his California detainer.

The relationship between Bergman and Porter and appellants' numerous contentions of error are discussed hereafter as they relate to the issue under discussion.

I

In the leading case of *New York Times Co. v. Sullivan* (1964) 376 U.S. 254 [11 L.Ed.2d 686, 84 S.Ct. 710, 95 A.L.R.2d 1412], the United States Supreme Court held that First Amendment principles require that public officials suing for libel must, as a prerequisite to recovery, establish by clear and convincing evidence that the defamatory publication is false and that it was published with "actual malice," which the high court defined as knowledge that the statement was false, or reckless disregard to whether it was false or not. (*Id.*, at pp. 279-280 [11 L.Ed.2d at p. 706].) Respondents concede their status as public officials within the *New York Times* rule. (See, e.g., *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 352 [41 L.Ed.2d 789, 812, 94 S.Ct. 2997]; *Gomes v. Fried* (1982) 136 Cal.App.3d 924, 933 [186 Cal.Rptr. 605].)

New York Times also required appellate courts in such cases to " 'make an independent examination of the whole record' " to assure "that the judgment does not constitute a forbidden intrusion on the field of free expression." (*New York Times Co. v. Sullivan, supra,* 376 U.S. at p. 285 [11 L.Ed.2d at p. 709]; *Bose Corp. v. Consumers Union of U.S., Inc.* (1984) 466 U.S. 485, [80 L.Ed.2d 502, 515, 104 S.Ct. 1949, 1958]; *St. Amant v. Thompson* (1968) 390 U.S. 727, 732-733 [20 L.Ed.2d 262, 268, 88 S.Ct. 1323]; *Belli v. Curtis Pub. Co.* (1972) 25 Cal.App.3d 384, 389 [102 Cal.Rptr. 122].) "[T]he rule is that we 'examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.' " (*New York Times Co. v. Sullivan, supra,* 376 U.S. at p. 285 [11 L.Ed.2d at p. 709].)

"The requirement of independent appellate review reiterated in *New York Times Co. v. Sullivan* is a rule of federal constitutional law." (*Bose Corp. v. Consumers Union of U.S., Inc., supra,* 466 U.S. at p. [80 L.Ed.2d at p. 523, 104 S.Ct. at p. 1965].) After reviewing the many cases in which it had been applied, the *Bose* court provided the clearest statement of the rule: "In such cases, the Court has regularly conducted an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited." (*Id.,* 466 U.S. at p. [80 L.Ed.2d at p. 519, 104 S.Ct. at p. 1962]; see also *Greenbelt Pub. Assn. v. Bresler* (1970) 398 U.S. 6, 11 [26 L.Ed.2d 6, 13, 90 S.Ct. 1537].) This does not mean, contrary to appellants' view, that we are to disregard the jury's findings concerning credibility of witnesses or permissive inferences which it might draw. Appellate courts are ill equipped to do so. The inflection or tone of voice, the emphasis of expression, the hesitant answer and the general attitude and demeanor of the witness are unavailable to us from the printed record. Our function on review is to "examine the evidence to see whether, if all permissible inferences were drawn in the planitiff's favor and all questions of credibility were resolved in his behalf, the evidence then would demonstrate by clear and convincing proof that the libelous material was published with actual malice. Once this question has been resolved in the plaintiff's favor, the jury's findings as to those inferences ansd as to witness credibility are determinative." (*Alioto v. Cowles Communications, Inc.* (9th Cir. 1975) 519 F.2d 777, 780; *Bose Corp. v. Consumers Union of U.S., Inc., supra,* 466 U.S. at pp. , [80 L.Ed.2d at pp. 511, 516, 104 S.Ct. at pp. 1955, 1959]; *Time, Inc. v. Hill* (1967) 385 U.S. 374, 394 [17 L.Ed.2d 456, 470, 87 S.Ct. 534]; *Bindrim v. Mitchell* (1979) 92 Cal.App.3d 61, 72 [155 Cal.Rptr. 29]; *Widener v. Pacific Gas & Electric Co.* (1977) 75 Cal.App.3d 415, 433 [142 Cal.Rptr. 304].) "[I]t is for the jury, not for this Court, to determine whether there was knowing or reckless falsehood." (*Time, Inc. v. Hill, supra,* 385 U.S. at p. 394, fn. 11 [17 L.Ed.2d at p. 470].)

II

Under these guidelines we dispose initially with some preliminary issues. First, we emphasize that we are not dealing with the right of the press to report, criticize or otherwise comment upon the conduct or behavior of public officials. That right is properly and firmly protected by the First Amendment. In *New York Times Co. v. Sullivan, supra,* 376 U.S. at page 270 [11 L.Ed.2d at page 701], the high court declared a "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." (See also *Garrison v. Louisiana* (1964) 379 U.S. 64, 74-75 [13 L.Ed.2d 125, 133, 85 S.Ct. 209], criticized on other grounds, 388 U.S. 130, 134 [18 L.Ed.2d 1094, 1099, 87 S.Ct. 1975]; *Okun v. Superior Court* (1981) 29 Cal.3d 442, 451 [175 Cal.Rptr. 157, 629 P.2d 1369]; *Gregory v. McDonnell Douglas Corp.* (1976) 17 Cal.3d 596, 604 [131 Cal.Rptr. 641, 552 P.2d 425].) We are dealing instead with the false publication, as a fact, that two police officers and a deputy district attorney conspired to and did suborn perjury in a criminal prosecution in order to convict an innocent person. In fact, we are confronted with clear and convincing evidence to support a finding that the false charges were fabricated by one of the appellants herein.

Second, libelous speech is not protected by the First Amendment. (*Bose Corp. v. Consumers Union of U.S., Inc., supra,* 466 U.S. at p. [80 L.Ed.2d at p. 519, 104 S.Ct. at p. 1961]; *Herbert v. Lando* (1979) 441 U.S. 153, 172 [60 L.Ed.2d 115, 131, 99 S.Ct. 1635]; *Gertz v. Robert Welch, Inc., supra,* 418 U.S. at p. 340 [41 L.Ed.2d at p. 805]; *Time v. Hill, supra,* 385 U.S. at pp. 389-390 [17 L.Ed.2d at p. 468]; *Garrison v. Louisiana, supra,* 379 U.S. at p. 75 [13 L.Ed.2d at p. 133].) "Libel is a false and unprivileged publication . . . which exposes any person to hatred, contempt, ridicule or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." (Civ. Code, § 45.) The publications at issue accused respondents of subornation of perjury, a serious crime involving moral turpitude. (Pen. Code, § 127.) "The charge of commission

of some kind of crime is obviously libel per se." (4 Witkin, Summary of Cal. Law (8th ed. 1974) Torts, § 281, p. 2550; *Gregory v. McDonnell Douglas Corp., supra,* 17 Cal.3d at p. 604; *Cianci v. New Times Pub. Co.* (2d Cir. 1980) 639 F.2d 54, 63-64.) "[T]here is no constitutional value in false statements of fact." (*Gertz v. Robert Welch, Inc., supra,* at p. 340 [41 L.Ed.2d at p. 805].) "Accusations of criminal activity, *even in the form of opinion,* are not constitutionally protected. . . . While inquiry into motivation is within the scope of absolute privilege, outright charges of illegal conduct, if false, are protected solely by the actual malice test. As noted by the Supreme Court of California, there is a critical distinction between opinions which attribute improper motives to a public officer and accusations, *in whatever form,* that an individual has committed a crime or is personally dishonest. No First Amendment protection enfolds false charges of criminal behavior. *Gregory v. McDonnell Douglas Corp.* [17 Cal.3d 596, 604 . . .]." (*Cianci v. New Times Pub. Co., supra,* at p. 63, citing *Rinaldi v. Holt, Rinehart & Winston, Inc.* (1977) 42 N.Y.2d 369, 382 [397 N.Y.S. 2d 943, 366 N.Ed.2d 1299], italics in original.) Respondents were accused of suborning perjury of a cirtical witness through threats, beatings and bribery to obtain the murder conviction of an innocent person. It is difficult to imagine an accusation more damaging to the integrity and careers of attorneys and police officers.[4] (See *Moranville v. Aletto* (1957) 153 Cal.App.2d 667, 672 [315 P.2d 91].)

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[4] On appeal, appellants do not suggest that the publications are not damaging to respondents' reputations. However, they were inconsistent in their position below. Both Bergman and Reginald Murphy, editor and publisher of the Examiner, testified that in their opinion the articles did not defame nor damage respondents. Ramirez admitted that the publications were damaging. William Burkhardt, the city editor, testified he recognized the libelous nature of the articles and for that reason had them reviewed by the managing editor and the Examiner's attorneys prior to publication. The record does not contain the attorneys' response. Bergman has a B.A. degree, three years of graduate study and at the time of trial had ten years experience as a journalist; his testimony that he did not recognize the damaging and destructive nature of the articles is extraordinary.

III

Appellants contend the publications are privileged under Civil Code section 47, subdivision 4, which establishes a privilege for all "fair and true" reports of judicial proceedings or "anything said in the course thereof." They claim the publications were related to Richard Lee's pending petition for writ of habeas corpus, and that the trial court erred by failing to instruct the jury regarding the possible application of the privilege.

The existence of a privileged occasion is a question of law for determination by the court, while fairness is a factual question for the jury. (*Handelsman v. San Francisco Chronicle* (1970) 11 Cal.App.3d 381 [90 Cal.Rptr. 188]; *Williams v. Daily Review, Inc.* (1965) 236 Cal.App.2d 405, 418-419 [46 Cal.Rptr. 135].) Generally, a report is fair and true if " ' . . . the substance, the gist, the sting of the libelous charge be justified, and if the gist of the charge be established by the evidence the defendant has made his case [for fairness and truth].' " (*Hayward v. Watsonville Register-Pajaronian and Sun* (1968) 265 Cal.App.2d 255, 262 [71 Cal.Rptr. 295], citing *Kurata v. Los Angeles News Pub. Co.* (1935) 4 Cal.App.2d 224, 227-228 [40 P.2d 520].)

California takes "a comparatively broad view" of the term "judicial proceeding" in Civil Code section 47 (*Glenn v. Gibson* (1946) 75 Cal.App.2d 649, 660 [171 P.2d 118]; *Albertson v. Raboff* (1956) 46 Cal.2d 375, 380-381 [295 P.2d 405]; *Hayward v. Watsonville Register-Pajaronian and Sun, supra,* 265 Cal.App.2d at 260; see also *Kurata v. Los Angeles News Pub. Co., supra,* 4 Cal.App.2d 224), and has extended it not only to statements made during trial, but to proceedings taken preliminary thereto. (*Lerette v. Dean Witter Organization, Inc.* (1976) 60 Cal.App.3d 573, 577 [131 Cal.Rptr. 592]; *Larmour v. Campanale* (1979) 96 Cal.App.3d 566, 568-569 [158 Cal.Rptr. 143]; *Izzi v. Rellas* (1980) 104 Cal.App.3d 254, 261, 264 [163 Cal.Rptr. 689].) Thus, the privilege of Civil Code section 47, subdivision 4, extends at least to fair and true reports of proceedings preliminary to litigation which are themselves privileged as to the parties to the proceedings. (*Handelsman v. San Francisco Chronicle, supra,* 11 Cal.App.3d 381.)

However, the privilege is not without its limitations. In order to invoke its protection, the alleged defamatory matter must, in the case of litigants, be made within a judicial proceeding, have some connection or logical relation to the proceeding and be made *"in furtherance of the litigation and to promote the interests of justice."* (*Bradley v. Hartford Acc. & Indem. Co.* (1973) 30 Cal.App.3d 818, 825, 826 [106 Cal.Rptr. 718], italics in original.) " '[I]t is equally clear, however, that a publisher who in fact espouses or concurs in the charges made by others or who deliberately distorts these statements to launch a personal attack of his own on a public figure, cannot rely on a privilege of neutral reportage' but rather 'assumes responsibility for the underlying accusations.' " (*Cianci v. New Times Pub. Co., supra,* 639 F.2d at p. 68, quoting *Edwards v. National Audubon Society* (2d Cir. 1977) 556 F.2d 113, 120.)

The Examiner took the position that the articles were developed as a project of "investigative reporting . . . aided by a grant from the Fund for Investigation Journalism of Washington, D.C." The decision to investigate and publish occurred long in advance of the initiation or conception of Lee's habeas corpus proceeding. The Examiner announced in its first article that its stories were "based on an independent investigation and on interviews with witnesses and others close to the case." It was the Examiner, through Bergman, who persuaded Porter to provide the affidavit, under questioned circumstances which we describe, *infra.* The Examiner admitted this when its editor was questioned: "[Q.] Well, Mr. Murphy, it was your paper that got all of these—or got this affidavit; wasn't it? [A.] Yes, sir. [Q.] And it was your paper that started all these proceedings, wasn't it? [A.] Yes." In addition, the Examiner paid the expenses of John Manning, the Indiana attorney who obtained Porter's signature to the affidavit; it arranged for an attorney to represent May Tom, a witness at the Lee trial whom appellants wanted to testify in connection with the habeas corpus proceeding, and it obtained the attorney representing Lee in the habeas corpus proceeding. It also published an editorial which its editor, Mr. Murphy, claimed *was designed to*

influence the courts to review the Lee case through the habeas corpus proceeding.[5]

The questioned articles were written not as a report of any judicial proceeding, but rather as an expose of police and district attorney corruption which the Examiner claimed to have uncovered *through its own independent investigation,* as it repeatedly reminded the reader. The writers and publisher were espousing and concurring in the charges made by Porter with the preconceived view that they were true, which is graphically illustrated not only by the articles themselves, but in the testimony of appellant Ramirez, under whose by-line the stories appeared: "[Q.] Was it your intention when you wrote these articles, May 19, 20, 21, to convey to the reading public that Richard Lee had been framed up by the police department? [A.] If you want a yes or no answer, I will say yes." Bergman testified that before he collaborated on the articles, he felt that respondents were "involved in a perversion and a corruption of the criminal justice system."

Bergman also wrote to Porter and told him he would not assist him in removing the California detainer until he had Porter's signed affidavit. The relevant portions of that letter state: "I can't make promises or go to bat for you in a full scale way until Manning [the Indiana attorney retained to obtain Porter's affidavit] finishes otherwise it will all get very complicated. I thought we had a clear understanding there." Bergman admitted he told Porter that Porter would have to "go further" than merely talk to Bergman if he wanted Bergman to become his "friend," and that any help to be forthcoming "would depend upon what's happening when we talked." Bergman's own notes say that Porter understands that "actions are what count" and until then Bergman would not help in removing the California detainer.

Thus, it is clear that the initial Porter affidavit came into being only as a result of the actions and conduct of the Examiner and its agents. The privilege was not designed to shield from liability those who create and file false or libelous charges with the courts

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[5] The editorial in question was published three days after receiving the demands for retraction.

in order to legitimize their subsequent publication. (See, e.g., *Bradley v. Hartford Acc. & Indem. Co., supra,* 30 Cal.App.3d at pp. 825-827.)[6]

Given their verdict, the jury necessarily found the publications to be false. It also found that appellants either knew them to be false or published with reckless disregard of their falsity. Consequently, the issue of "fairness" becomes irrelevant, since Civil Code section 47, subdivision 4, requires that the report be both "fair and true" to be privileged. Moreover, if fairness is considered, the finding that respondents published with knowing or reckless disregard of falsehood negates the element of fairness. Appellants' contention that the publications are privileged because they truthfully reported what was contained in the Porter affidavit cannot be sustained, since they created that affidavit. To allow them such protection would permit the sort of "bootleg" approach condemned by the *Bradley* court.

IV

We also conclude that sufficient clear and convincing evidence exists to support a finding of actual malice which, as we previously noted, is defined as knowledge that the published statement was false, or publication with reckless disregard of whether it was false or not. The existence of actual malice involves the determination of the publisher's state of mind and is a factual question for the jury. (*Time, Inc. v. Hill, supra,* 385 U.S. at p. 394 [17 L.Ed.2d at pp. 470-471]; *Alioto v. Cowles Communications, Inc., supra,* 519 F.2d at p. 780; *Reader's Digest Assn. v. Superior Court*

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[6] We do not imply that investigative journalism should be curtailed nor in any manner discouraged. To the contrary, a free press may be society's only effective watchdog over governmental conduct and other activities affecting the public interest. (See, e.g., *New York Times Co. v. Sullivan, supra,* 376 U.S. at pp. 270-271 [11 L.Ed.2d at p. 701]; Douglas, The Right of the People (Arena ed. 1972).) However, a clear and necessary distinction exists between the discovery of news and its creation. The jury obviously determined that the "facts" in the initial Porter affidavit were *created,* rather than *discovered* through legitimate investigation.

(1984) 37 Cal.3d 244, 258 [208 Cal.Rptr. 137, 690 P.2d 610]; *Widener v. Pacific Gas & Electric Co., supra,* 75 Cal.App.3d at p. 433. Actual malice may be established by either direct or circumstantial evidence. (*St. Amant v. Thompson, supra,* 390 U.S. 727; *Herbert v. Lando, supra,* 441 U.S. at p. 164, fn. 12 [60 L.Ed.2d at pp. 126-127]; *Reader's Digest Assn. v. Superior Court, supra,* 37 Cal.3d at pp. 257-258.) Our conclusion that a finding of actual malice is supported by clear and convincing evidence in the instant case includes both the elements of knowledge and of reckless disregard.

Actual knowledge needs no definition and, in the context of this record, finds its support in the trial testimony of Porter. Porter testified he told Bergman that his testimony in the Lee case was true, but that Bergman was not satisfied with that statement and told him he could not affect the removal of the California detainer unless Porter changed his story. He said Bergman told him the San Francisco police were known for threatening witnesses into giving perjured testimony. Porter further stated that Bergman suggested to him what he should say in recanting his Lee trial testimony. This constitutes direct evidence of actual knowledge, at least as to Bergman.

Reckless disregard "cannot be fully encompassed in one infallible definition. Inevitably its outer limits will be marked out through case-by-case adjudication, as is true with so many legal standards for judging concrete cases, whether the standard is provided by the Constitution, statutes, or case law. . . . [R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice. . . . [¶] The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where

a story is fabricated by the defendant [or] is the product of his imagination. . . . Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." (*St. Amant v. Thompson, supra,* 390 U.S. at pp. 730-732 [20 L.Ed.2d at pp. 266-267].)

A review of some of the factors which could reasonably be expected to affect the veracity of the informant, the accuracy of his report and appellants' state of mind supports respondents' position that the finding of actual malice is based upon clear and convincing evidence:

(1) Porter was desperate to have the California detainer removed; he did not want to return to California to serve additional time when his federal sentence was up. He was concerned about the treatment he might receive in a California prison as an informant.

(2) Bergman repeatedly told Porter he would help him with the California detainer only in exchange for Porter's cooperation. In his letters to Porter he advised him that Porter's attorneys were not doing anything for him, but that Bergman had a friend "[r]ight smack in the middle of the Governor's office" who would assist in removing the California detainer. As mentioned above, Bergman told Porter he would not help him until Porter produced the affidavit repudiating his Lee trial testimony.

(3) John Manning, the attorney who interviewed Porter and obtained his affidavit had serious reservations about Porter's testimony, which he conveyed to Bergman. Witness the following testimony from Manning during the trial below: "[Q.] When you left Porter after your second meeting, had you formed any opinion as to his veracity at that time? [A.] Oh, sure. [Q.] What was your opinion then? [A.] My opinion and my opinion now is that Porter would say or do anything to improve his position behind bars. [Q.] Would it also be correct that you had some doubt in your own mind as

to the truth of the matters in there? [A.] Yes. [Q.] All right. [A.] I will tell you the reason: Because I was not able to pin him down on some details that in my own mind I felt I should have been able to pin him down on if he was telling me the truth. [Q.] Did you ever convey that doubt to Mr. Bergman? [A.] Yes."

(4) Appellant Ramirez had been advised by one of his colleagues on the Examiner, by the attorney for Richard Lee and by his city editor that Erdelatz and McCoy were considered to be good police officers. Both Ramirez and the city editor, William Burkhardt, knew that the publication of the articles would seriously damage respondents' reputations. Burkhardt recognized the libelous nature of the articles and sent them on to the managing editor and the Examiner's attorneys for review and comment prior to publication.

(5) Appellants had Porter's statement for nearly one and one-half years and his affidavit for nearly a year before the articles in question were published. During that period they conducted an investigation, including a fruitless search for three specific witnesses whom Porter said he told about respondents' alleged misconduct.[7] Porter also stated that the injuries he received as a result of the beatings from the officers required treatment while he was in jail in San Francisco. No medical records could be located to verify this statement. In total, appellants were unable to corroborate any of Porter's libelous charges through any other source, although they admitted they knew it was important to do so.[8] In fact, they said Examiner policy required corroboration.

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[7] Porter claimed to have told his father, his sister and a jail chaplain about the respondents' conduct. His father was deceased; the one occasion when appellants attempted to contact his sister she would not talk to them, and the existence of the chaplain could never be verified.

[8] In light of appellents' stated belief that Richard Lee was factually innocent and "framed" for Leong's murder, there are some other obvious areas of investigation they failed to pursue. For instance, Richard Lee did not testify during his trial. Thus, he has never denied, under oath, killing Leong, nor has he denied the accuracy of Porter's

(6) In an internal memorandum from Ramirez to his editor and other Examiner employees, Ramirez admitted that Porter's statement should be viewed with skepticism. Ramirez himself testified that he did not believe everything Porter said in his affidavit, but characterized it as "exaggeration." Bergman also admitted at one point that he did not accept all of Porter's statement as being true.[9]

(7) When Bergman interviewed Porter in prison, Porter did not tell him of the alleged beatings by Erdelatz and McCoy which necessitated medical treatment. Appellants first learned this information when they received Porter's affidavit from Manning. Yet, no one spoke to Porter again to inquire about this new and significant information, and why Porter had not told Bergman during the interview. In fact, no one from the Examiner staff ever met with Porter. Ramirez even testified that he did not recall ever having a discussion with Bergman about his notes of the Porter interview. How-

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trial testimony. To the contrary, he subsequently admitted to the police that Porter's testimony during his trial was truthful. (Neither did he do so during his habeas corpus proceeding. His testimony therein was limited solely to the fact that he had no knowledge of any promises made to Porter in exchange for his trial testimony.) Appellants also claim that proof of Lee's innocence was confirmed by the fact that he had a number of alibi witnesses. However, none of them were called to testify during his trial. Appellants interviewed them, as well as Lee's trial attorney, but failed to ask anyone why they were not called to testify during the Lee trial, or why they were not being used during the habeas corpus proceeding. Nor has anyone ever asked why Lee himself never testified to deny the murder or deny his confession to Porter. These are obvious areas of inquiry for anyone interested in determining Lee's factual innocence.

[9] In his affidavit Porter claimed to have met with Merle over 30 times prior to trial for the purpose of memorizing the "script" of his trial testimony which Merle had allegedly prepared. Bergman and Ramirez both admitted they did not believe this many meetings took place. However, what they actually believed or did not believe was a question for the jury, and a legitimate inference can be drawn from his entire testimony that Ramirez did not believe Porter.

ever, he said Bergman told him Porter was "confused and disorganized about things."

(8) Appellants failed to follow through with an investigation into firsthand knowledge of Richard Lee's involvement in the murder. Shortly after Leong was killed and prior to Lee's arrest, Lee conferred with a prominent and highly respected criminal lawyer to discuss his case. This attorney did not represent Lee at trial, but appellants discovered the conference had occurred and contacted the attorney for information. The attorney advised them he could not discuss it with them because of the attorney-client privilege, but would do so if they obtained a release from Lee. However, *he also advised them that what he knew would not be helpful to Lee.* Appellants then asked Lee if he would waive the privilege to permit them to speak with the attorney. Lee agreed to do so, but advised appellants that he never discussed Leong's murder with the attorney. Appellants accepted Lee's story and never contacted the attorney again to determine what information he had.[10] Although failure to investigate will not, by itself, necessarily support reckless misconduct, it is a factor which may be considered, at least where, as here, there was time to investigate. (*Herbert v. Lando, supra,* 441 U.S. at p. 164, fn. 12 [60 L.Ed.2d at pp. 126-127].)

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[10] This episode is representative of the inconsistency of appellants' positions both at trial and on appeal. They have repeatedly urged that one of the reasons they chose to believe the initial Porter story was because *they believed Richard Lee was factually innocent* of Leong's murder. Yet, the opportunity to obtain firsthand information from the first attorney Lee met with was readily available to them and they failed to examine it. This is particularly significant since the attorney told them his information would not be beneficial to Lee. Their explanation is "[b]cause Ramirez felt that Richard Lee would not lie to him at that stage of their relationship, and *because at that point in their investigation the journalists' concerns had focused on the fairness of the criminal proceedings in San Francisco Chinatown cases rather than on the guilt or innocence of one person. Bergman failed to reinterview [the attorney] in the remaining weeks before the writing of the story.*" (Italics ours.)

(9) Most importantly, following his trial and conviction, *Lee admitted to the police that Porter's trial testimony was essentially accurate.*

Porter testified, in substance, that he was prompted into producing the false affidavit by Bergman's offers of help in removing the California detainer, and that Bergman knew his affidavit was false because Porter told Bergman that his testimony during Lee's trial was truthful. He said Bergman told him he needed a different sort of statement from him, and that if he changed his story Bergman would help him with the detainer. He said that when Bergman first asked him if the police had threatened him he told him they had not. Bergman then told him that the San Francisco police had been known to pressure people, to get false statements from them and threaten their lives. Bergman suggested that he would have to change his story if he expected help getting his detainer removed. He said Bergman asked him leading questions and suggested what he should say.

In addition, prior to the time Bergman first contacted him, Porter had written to Erdelatz and McCoy thanking them for their kindness and assistance during the Lee trial, and wished them and their families a Merry Christmas: unusual conduct by one who had been beaten and had his life threatened by those same officers.

With regard to the publication that Merle had been disciplined by the State Bar, the original source of that information was Patrick Hallinan, a local attorney, who advised Ramirez that he had officially complained about Merle to the State Bar. However, before the articles were written, Hallinan advised Ramirez that the State Bar proceedings against Merle had been dropped. Bergman admitted that he knew the charges had to be reviewed by a higher committee of the Bar, and that he was "not clear" whether Merle "had avoided sanctions at a higher level."

The foregoing constitutes not only substantial evidence that the publications were false, but also clear and convincing evidence to support a finding of actual malice under *New York Times*.

V

Appellants assign as error numerous evidentiary rulings by the trial court. At oral argument they advanced the theory that the definition of relevant evidence in Evidence Code section 210 and the court's discretion to exclude evidence under Evidence Code section 352 have no application to defendants in libel suits, although they contend the same statutes operate to limit plaintiffs' evidence. Specifically, they contend there are neither qualitative nor quantitative limits on the evidence which they can introduce to demonstrate their state of mind at the time of publication. Appellants offer no authority for this unique proposition, and we are aware of none. (15) We agree that defendants in libel actions, particularly those brought by public officers or figures, must be accorded wide latitude in presenting evidence bearing on their state of mind. (*St. Amant v. Thompson, supra,* 390 U.S. 727; *Herbert v. Lando, supra,* 441 U.S. 153; *Hearne v. De Young* (1898) 119 Cal. 670 [52 P. 150].) However, in the absence of contrary authoritative requirements, we will be guided by the Evidence Code and prior decisional law.

Evidence must be relevant to be admissible. (Evid. Code, § 350.) Relevant evidence is defined as "evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210; see also, 1 Jefferson, Cal. Evidence Benchbook (2d ed. 1982) § 19.2, pp. 452-453; Witkin, Cal. Evidence (2d ed. 1966) § 302 et seq.)

Article VI, section 13 of the California Constitution provides that "[n]o judgment shall be set aside, or new trial granted, in any cause, on the ground of . . . the improper admission or rejection of evidence . . . unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

A miscarriage of justice should be declared only when the court, after an examination of the entire cause, including the evidence, is of the opinion that it is *reasonably probable* that a

result more favorable to the appealing party would have been reached in the absence of the error. (*Clifton v. Ulis* (1976) 17 Cal.3d 99, 105-106 [130 Cal.Rptr. 155, 549 P.2d 1251]; *People v. Watson* (1956) 46 Cal.2d 818, 836 [299 P.2d 243]; *Brokopp v. Ford Motor Co.* (1977) 71 Cal.App.3d 841, 853 [139 Cal.Rptr. 888, 93 A.L.R.3d 537].)

The Evidence Code provides additional guidance as to when an evidentiary ruling may be held erroneous and/or when a judgment may be reversed because of an erroneous admission or exclusion of evidence.

As to the erroneous admission of evidence, Evidence Code section 353 states that "[a] verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: (a) There appears of record an objection to or motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and (b) the court . . . is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice."

With regard to the erroneous exclusion of evidence, Evidence Code section 354 provides that "[a] verdict or findings shall not be set aside, nor shall the judgment of decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court . . . is of the opinion that the error or errors complained of resulted in a miscarriage of justice and it appears of record that: (a) The substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means; (b) The rulings of the court made compliance with subdivision (a) futile; or (c) The evidence was sought by questions asked during cross-examination or re-cross-examination."

Evidence Code section 352 states, "The court *in its discretion* may exclude evidence if its probative value is substantially outweighted by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of

undue prejudice, or confusing the issues, or of misleading the jury." (Italics added.)

The trial court's exclusive discretion to analyze and determine the evidentiary value of an offer of proof under section 352 attack is well established. (*Rosener v. Sears Roebuck & Co.* (1980) 110 Cal.App.3d 740, 756 [168 Cal.Rptr. 237]; *Huber, Hunt & Nichols, Inc. v. Moore* (1977) 67 Cal.App.3d 278, 295 [136 Cal.Rptr. 603]; *Cain v. State Farm Mut. Auto. Ins. Co.* (1975) 47 Cal.App.3d 783, 798 [121 Cal.Rptr. 200].) In reviewing the trial court's exercise of descretion under section 352, "an appellate court is neither authorized nor warranted to substitute its judgment for that of the trial judge." Only where the alleged abuse of discretion clearly constitutes a miscarriage of justice, may the appellate court reverse the judgment. (*Cain v. State Farm Mut. Auto. Ins. Co., supra,* at p. 798.)

The trial court's discretion, under section 352, is not unlimited, however. It must balance the probative value of the proffered evidence against its prejudicial effect in the context of the case at hand. (*Burke v. Almaden Vineyards, Inc.* (1978) 86 Cal.App.3d 768, 774 [150 Cal.Rptr. 419].) The more substantial the probative value, the greater must be the prejudice in order to justify the exclusion. "If such *probative value is absent* [however], this court will not interfere with the trial court's determination [under section 352]." (*Brainard v. Cotner* (1976) 59 Cal.App.3d 790, 795 [130 Cal.Rptr. 915], italics added.)

A trial court's analysis, under section 352 objection, should include the following: the materiality of the evidence; the strength of its relationship to the issue upon which it is offered; whether it goes to a primary issue in the case; and whether it is necessary to prove the proponent's case or whether the evidence is merely cumulative to other available and sufficient proof. Cumulative evidence may be regarded as having less probative value. (*Burke v. Almaden Vineyards, Inc., supra,* 86 Cal.App.3d at p. 774; *Thor v. Boska* (1974) 38 Cal.App.3d 558, 568, fn. 8 [113 Cal.Rptr. 296].) Further, where the proffered evidence "obscur[es] the more immediate question" at hand, it is within the trial court's discretion to exclude it. (*Wagner v. Benson* (1980) 101 Cal.App.3d 27, 36 [161 Cal.Rptr. 516].

Where the minimal probative value of the proffered evidence is outweighed by the disadvantage of protracting an already lengthy trial, it is not error for the trial court to exclude it. (*City of Los Angeles v. Retlaw Enterprieses, Inc.* (1976) 16 Cal.3d 473, 491 [128 Cal.Rptr. 436, 546 P.2d 1390]; *Rosener v. Sears Roebuck & Co., supra,* 110 Cal. App.3d at p. 756.)

Detrimental effect to appellant is not necessarily undue prejudice. When the only prejudice to the party lies in material and relevant inferences to a crucial issue, the trial court is within its discretion to admit such evidence. (*Burke v. Almaden Vine yards, Inc., supra,* 86 Cal.App.3d at p. 773; *Thor v. Boska, supra,* 38 Cal.App.3d at p. 567.)

Within these guidelines we consider the various claims of error in the exclusion and admission of evidence.[11]

(a) *Bergman's politics, family life and pending libel suit.*

Respondents were able to introduce, over objection, that Bergman had another libel suit pending and that he had children out of wedlock. Respondents contend the evidence concerning the pending libel suit was relevant in that it should have put the Examiner on notice that Bergman's material was suspect. They attempt to justify the evidence of Bergman's marital situation on the grounds that it showed he needed money to support his children. Since he was a freelance journalist working for the Examiner only for this series of articles, respondents reason that financial pressures forced him to get the story into print regardless of its accuracy or obvious harm to them. They also contend that this evidence was inevitably coming before the jury because it was contained in correspondence from Bergman to Porter, and since the correspondence was independently admissible, the objectionable material would also be in evidence. We agree with appellants that introduction of this matter was error.

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[11] Appellants have assigned as error virtually every ruling made by the trial court. With some exceptions, they deal with the same general subject matter and may be decided collectively. We have classified them accordingly.

Libel suits are an inherent risk in the publishing business, and the mere fact that a suit has been filed on an unrelated matter does not establish that the reporter who wrote it was reckless or had knowledge that the article contained false facts, or that the pending action has any merit. In the instant case, it had no tendency in reason to put the Examiner on notice that Bergman's reports on the subject matter in the instant case were false or inaccurate.

Bergman's marital status is also irrelevant. The references in the correspondence to the pending libel action could easily have been deleted; the reference to Bergman's children does not even mention his marital status.

Appellants also contend that respondents were improperly permitted to explore Bergman's policital beliefs, and to inquire about the newspapers for which he previously wrote, and the articles which he published. Respondents contend that articles published by Bergman which were critical of President Reagan, former Attorney General Evelle Younger and the F.B.I. showed that Bergman was "anti-administration," and that the publications which carried them were "radical" or "underground." They argue that Bergman's precious writings demonstrated his bias and put the Examiner on notice that such bias existed.

Inquiries into Bergman's general political affiliations and beliefs, unless clearly relevant, may violate his First Amendment right of privacy, (*N. A. A. C. P. v. Alabama* (1958) 357 U.S. 449 [2 L.Ed.2d 1488, 78 S.Ct. 1163]; *Britt v. Supervior Court* (1978) 20 Cal.3d 844 [143 Cal.Rptr. 695, 574 P.2d 766].) In the context of the case before us we see no relevancy between Bergman's general political views (i.e., Democrat, Republican or other; "left," "right" or "middle") and his basic honesty or integrity for news gathering or reporting. However, if his previous writings or the particular publications for which he wrote display a bias against the police, the prosecution or law enforcement in general, the evidence of those writings and those publications becomes relevant. (Evid. code, § 780, subd. (f); 2 Jefferson, Cal. Evidence Benchbook (2d ed. 1982) § 28.6, p. 900; Witkin, Cal. Evidence (2d ed. 1966) § 1229 et seq.; *Herbert v. Lando, supra,* 441 U.S. at p. 164, fn. 12 [60 L.Ed.2d at pp. 126-127].)

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Our examination of the record reveals that the references to this material were few, and lacked emphasis. The witnesses acquitted themselves well on cross-examination, and we conclude that if any error existed in admission of this material, it was harmless.

(b) *Evidentiary rulings in the Richard Lee trial.*

Appellants claim error in the exclusion of evidence concerning the evidentiary rulings made by the trial court during the Richard Lee trial. They contend that the evidentiary rulings by the Richard Lee trial court were relevant to demonstrate that Lee did not receive a fair trial. At the time of trial in the instant case, Lee's conviction had been affirmed on appeal and was final. His habeas corpus petition had also been denied and was final. Thus, the issue of whether Richard Lee had received a fair trial had already been determined as a matter of law. Further, the "fairness" of his trial, in the abstract, was not in issue. Appellants were perfectly free to comment about the fairness or inequities of the justice system, but they were not being sued for that reason. The issue in the instant case was whether appellants published the libelous articles in question with actual malice. Admission of evidence concerning rulings in the preceding criminal trial would have protracted the trial of the instant case and would have confused the jury by introducing a remote and collateral subject. This material was irrelevant and, in any event, subject to exclusion under Evidence Code section 352.

(c) *Chinatown background.*

Appellants contend that evidence of various interviews and conversation with Chinatown youths, community leaders, police officers and social workers were erroneously excluded. They argue that these interviews were relevant to state of mind, in that they gave them an understanding of the relationship between the authorities and the Chinese youth, insight into other criminal cases arising out of Chinatown and police corruption and "payoffs" in that community. The trial court's exclusion of this evidence was based either on relevancy or Evidence Code section 352 grounds. We perceive no error in the trial court's rulings. Much of this evidence was cumulative and repetitious. Appellants

admitted they had *no evidence* that any of the respondents were involved in any corruption or "payoiffs," and *none* of this evidence corroborated or supported Porter's initial story about subornation of prejury in the Lee trial. Any probative value such evidence would have was far outweighed by the undue consumption of time and confusion which would result from protracted litigation. (See, e.g., *Wagner v. Benson, supra,* 101 Cal.App.3d at p. 36.)

(d) *The Rubin Scott incident.*

Rubin Scott was a fugitive wanted for the murder of a San Francisco police officer. While at large he was arrested and held in New Orleans for a crime committed there. McCoy and Erdelatz learned of his capture and went to New Orleans to interview him in connection with the murder of the police officer in San Francisco. Unknown to them, a New Orleans judge had ordered that Scott not be interviewed about the New Orleans crime outside the presence of his Louisiana attorney. Erdelatz and McCoy obtained a confession from Scott concerning the San Francisco murder, but it was later ruled inadmissible by a San Francisco judge, presumably because it violated Scott's right to counsel under the order issued by the New Orleans court. In addition, it was alleged that Scott was physically abused by members of the New Orleans Police Department while he was in their custody. Erdelatz and McCoy were never accused of abusing Scott, nor was it alleged that any abuse took place in their presence. There was never any judicial finding of physical abuse and Scott himself, apparently during an unrelated proceeding in Los Angeles, denied that any such abuse took place.

The trial court granted respondents' motion to exclude any mention of the Rubin Scott incident under Evidence Code section 352 and on the grounds of relevancy. Appellants contend such evidence was relevant to their state of mind and its exclusion resulted in reversible error. We disagree, rejecting again appellants' argument that there are no limitations on the evidence which they are permitted to introduce to show state of mind. Their offer of proof failed to demonstrate that (1) respondents had any knowledge of the Louisiana court order; (2) respondents had any reason to believe they were prohibited from interviewing Scott concerning the murder of the San Francisco police officer;

(3) respondents had knowledge that Scott was assaulted by the New Orleans police; (4) respondents had otherwise conducted themselves improperly or unlawfully in connection with the Scott investigation. Given Scott's later denial of any brutality by the New Orleans police, it is obvious that any probative value of this evidence is substantially outweighed by the probability that its introducton would have necessitated undue consumption of time and confused the issues. (Evid. Code, § 352.)

(e) *The discovery sanctions.*

During the course of their investigation appellants were told by Attorney Patrick Hallinan that he had filed a charge of misconduct against respondent Merle with the State Bar. Bergman and Ramirez were advised by Larry Hatfield, an Examiner reporter, that Hatfield's confidential source at the State Bar said the bar was instituting disciplinary proceedings against Merle. However, by the time the article containing the disciplinary story had been published, the bar had dismissed the charges against Merle.

During discovery, Hatfield refused to reveal his State Bar source. A motion to compel revelation of the source ultimately resulted in an order which provided that if Hatfield failed to reveal his source appellants would be precluded from introducing any evidence pertaining to its existence, but Ramirez could testify that the information he received came from Hatfield, a respected reporter upon whom he had relied in the past.

Hatfield never revealed his source, and during trial the court refused to permit Ramirez to testify about how he received the information from Hatfield or about Hatfield's reputation as a journalist with State Bar sources. Appellants contend the sanctions were improper because Hatfield was not a party and they could not be punished for the refusal of a nonparty to respond to discovery. This contention is meritless.

Article I, section 2, subdivision (b) of the California Constitution and Evidence Code section 1070 prohibit contempt proceedings against publishers, editors, reporters and others for failure to reveal their sources of information. Code of Civil Procedure section 2034 provides, in part, that if any agent or employee of any party to an action fails to provide discovery or respond to

appropriate questions during his or her deposition, the court may impose reasonable sanctions or "make any orders in regard to the refusal which are just . . . ." The court can order, among other things, that the facts about which discovery was refused may be deemed to be established in accordance with the position of the opposing party. (Code Civ. Proc., § 2034, subd. (b)(2)(A).) Although Hatfield could not be compelled to reveal his source, the ruling was appropriate under these circumstances; Hatfield was employed by the Examiner.

In addition, Ramirez testified that before he wrote the articles Hallinan advised him personally that the State Bar proceedings had been dropped. Bergman testified that he knew Merle's case had to be reviewed by a higher State Bar committee, and that he was not certain whether Merle had "avoided sanctions at a higher level." Given this situation, we find no error. Even if it was error, it is harmless.

(f) *Miscellaneous rulings.*

Appellants attack other rulings excluding evidence: (1) McCoy's view of Porter's credibility, (2) postconviction questioning of Lee concerning an unrelated homicide, (3) Ramirez' mistake in erroneously publishing that Manning visited Porter on a second occasion, (4) the procedures within the Governor's office for removal of detainers, (5) Bergman's explanation for writing to Porter about removal of his detainer, and (6) alleged curtailment of cross-examination concerning damages.

We have already reviewed the appropriate rules of evidence and the standards of review. The parties are familiar with the facts and the record and we find it unnecessary to set out all their contentions in detail. It suffices to say that most of the matters complained of involved irrelevant evidence or were cumulative, subject to section 352 exclusion, or harmless. We cannot say their admission would have resulted in a verdict for appellants, or any of them.

VI

Appellants next claim error due to several jury instructions concerning libel, actual malice, privileged publications and damages.

The court's duty to instruct the jury is discharged if its instructions embrace all points of law necessary to a decision. (*Hyatt v. Sierra Boat Co.* (1978) 79 Cal.App.3d 325, 335 [145 Cal.Rptr. 47].) A party is not entitled to have the jury instructed in any particular fashion or phraseology, and may not complain if the court correctly gives the substance of the applicable law. (*Zhadan v. Downtown Los Angeles Motor Distributors, Inc.* (1979) 100 Cal.App.3d 821, 839 [161 Cal.Rptr. 225]; *Hyatt v. Sierra Boat Co., supra,* 79 Cal.App.3d at p. 336.) Only if it appears that an error in instructions was likely to mislead the jury and thus become a factor in its verdict will error be considered prejudicial. (*Henderson v. Harnischfeger Corp.* (1974) 12 Cal.3d 663, 670 [117 Cal.Rptr. 1, 527 P.2d 353]; Cal. Const., art. VI, § 13.)

Appellants first contend the court erred by defining libel as a "false and unprivileged" publication and then refusing to define a privileged publication, as they requested. We have already concluded that the question of privilege is a legal issue for the court's determination and that no privilege existed under the facts of the instant case. Hence, no error occurred.

Second, appellants observe that the trial court did not use the term "actual malice" in defining respondents' burden of proof, but used it later when it instructed that "You cannot infer or presume actual malice solely from the fact that the publication was made. You are instructed that negligence by a publisher is not the equivalent, nor is it sufficient to prove reckless disregard or knowing falsity on the part of [appellants]." Appellants contend this generated confusion and requires reversal.

We conclude that the trial court addressed the issue sufficiently. In other instructions it advised the jury that respondents had to prove by clear and convincing evidence that appellants published the challenged statements with knowledge of their falsity or with reckless disregard of the truth. The court also

emphasized that negligence was not a sufficient basis for liability. Appellants further argue the instruction was erroneous because it only informed the jurors they could not infer actual malice from publication, whereas they contend the jury should have been instructed it could not infer actual malice from the content of the articles. This is a hypertechnical distinction which was unlikely to influence the jurors. We conclude the instructions in this regard were adequate.

Third, appellants challenge an instruction which stated: "Reckless disregard of truth or falsity may be found, even though an affidavit was obtained from a person, if there are obvious reasons to doubt the veracity of that person or the accuracy of his affidavit, and there is no other substantial independent support for the charges in the affidavit." Appellants claim this instruction led the jury to believe that failure to investigate, by itself, establishes actual malice, and that it implicitly shifted the burden of proof to them. We do not draw the same conclusion. The language of this instruction was taken from *Curtis Publishing Co. v. Butts* (1967) 388 U.S. 130, 154-155 [18 L.Ed.2d 1094, 1111, 87 S.Ct. 1975]. Appellants contend the facts in *Butts* were so radically different from those in the instant case as to render the instruction erroneous here. We again disagree, and conclude that this isolated instruction, when viewed in context, provides no cause for reversal. (*St. Amant v. Thompson, supra,* 390 U.S. 727; *Curtis Publishing Co. v. Butts, supra,* 388 U.S. at pp. 156-157 [18 L.Ed.2d at p. 1112]; *Reader's Digest Assn. v. Superior Court, supra,* 37 Cal.3d 244; *Widener v. Pacific Gas & Electric Co., supra,* 75 Cal.App.3d at p. 434.)

Finally, appellants complain about the form of the instructions concerning actual malice, defining reckless disregard and dealing with punitive damages. We have reviewed them in their entirety and in context with the entire package of instructions given the jury. They contain an accurate statement of the legal issues necessary for a determination of the issues with which they are concerned. In fact, the instruction on punitive damages actually favors appellants, since it advised the jury that the elements of punitive damages had to be proven by clear and convincing evidence, whereas a preponderance of the evidence is all that is

required. (*Burnett v. National Enquirer, Inc.* (1983) 144 Cal.App.3d 991, 1008-1009 [193 Cal.Rptr. 206]; *Curtis Publishing Co. v. Butts, supra,* 388 U.S. at pp. 160-161 [18 L.Ed.2d at p. 1114]; *Cantrell v. Forest City Publishing Co.* (1974) 419 U.S. 245, 251-252 [42 L.Ed.2d 419, 426, 95 S.Ct. 465].)

VII

Appellants next challenge the punitive damage awards, contending the federal and state Constitutions bar awards of punitive damages to public officials in libel cases. They cite no controlling authority for this argument. Civil Code section 48a, subdivision 4(c) specifically permits punitive damages in libel cases, and we are required to interpret statutes so as to uphold their constitutionality, if at all possible. (*Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 253 [158 Cal.Rptr. 330, 599 P.2d 636]; *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 229-230 [110 Cal.Rptr. 144, 514 P.2d 1224].) Appellants have cited none and we are unaware of any decisions of the United States or California Supreme Courts holding that the federal or state Constitution bars public officials from recovering punitive damages in libel cases. However, numerous California and federal cases have approved or upheld such awards. In *Curtis Publishing Co. v. Butts, supra,* 388 U.S. 130, the United States Supreme Court addressed the same issue and rejected the concept that punitive damages are constitutionally prohibited in libel cases. (See *Herbert v. Lando, supra,* 441 U.S. at pp. 161-162 [60 L.Ed.2d at p. 125].) In *Maheu v. Hughes Tool Co.* (9th Cir. 1978) 569 F.2d 459, 478-479, the Ninth Circuit, citing *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323 [41 L.Ed.2d 789, 94 S.Ct. 2997] and other federal circuits (*Goldwater v. Ginzburg* (2d Cir. 1969) 414 F.2d 324, cert. den., 396 U.S. 1049 [24 L.Ed.2d 695, 90 S.Ct. 701]; *Buckley v. Littell* (2d Cir. 1976) 539 F.2d 882, cert. den., 429 U.S. 1062 [50 L.Ed.2d 777, 97 S.Ct. 785, 786]; *Davis v. Schuchat* (D.C. Cir. 1975) 510 F.2d 731; *Appleyard v. Transamerican Press, Inc.* (4th Cir. 1976) 539 F.2d 1026; cert. den., 429 U.S. 1041 [50 L.Ed.2d 753, 97 S.Ct. 740]), concluded that punitive damages were constitutionally permissible in public official or public figure cases. California courts have

agreed. (*Kapellas v. Kofman* (1969) 1 Cal.3d 20 [81 Cal.Rptr. 360, 459 P.2d 912]; *Burnett v. National Enquirer, Inc., supra,* 144 Cal.App.3d 991; *Bindrim v. Mitchell, supra,* 92 Cal.App.3d 61; *Montandon v. Triangle Publications, Inc.* (1975) 45 Cal.App.3d 938 [120 Cal.Rptr. 186, 84 A.L.R.3d 1234]; *Field Research Corp. v. Patrick* (1973) 30 Cal.App.3d 603 [106 Cal.Rptr. 473].) In light of existing precedent, it is clear that no constitutional impediment exists to respondents' recovery of punitive damages.

It is equally clear that once the standard for liability has been met, the assessment of punitive damages has been left to state law. (*Curtis Publishing Co. v. Butts, supra,* 388 U.S. at pp. 160-161 [18 L.Ed.2d at p. 1114]; *Cantrell v. Forest City Publishing Co., supra,* 419 U.S. at pp. 251-252 [42 L.Ed.2d at p. 426]; *Hunt v. Liberty Lobby* (11th Cir. 1983) 720 F.2d 631, 649-651; *Maheu v. Hughes Tool Co., supra,* 569 F.2d at pp. 478-480; *Burnett v. National Enquirer, Inc., supra,* 144 Cal.App.3d at p. 1008.) In California, Civil Code section 48a limits the right to recover punitive damages for libel from newspapers and broadcasters by requiring the plaintiff to demand a retraction and establish "actual malice" on the part of the defendant before punitive damages may be recovered. "Actual malice" under Civil Code section 48a is defined as "that state of mind arising from hatred or ill will toward the plaintiff,"[12] and it cannot be "inferred or presumed from the publication . . . ." *Ibid.; Nova v. Flaherty* (1956) 145 Cal.App.2d 761, 764 [303 P.2d 382]. However, being a state of mind, it may be established by circumstantial evidence or inferred from other facts in the case. (Evid. Code, § 600, subd. (b); 4

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[12] Subdivision 4(d) of Civil Code section 48a states: " 'Actual malice' is that state of mind arising from hatred or ill will toward the plaintiff; provided, however, that such a state of mind occasioned by a good faith belief on the part of the defendant is the truth of the libelous publication or broadcast at the time it is published or broadcast shall not constitute actual malice." This portion of the statute was enacted prior to the *New York Times* decision.

The proviso relating to good faith belief is irrelevant to the punitive damages definition of "actual malice" post-*New York Times,* since that state of mind would preclude initial liability in cases involving public officials.

Witkin, Summary of Cal. Law (8th ed. 1974) Torts, § 304, pp. 2575-2576; Witkin, Cal. Evidence (2d ed. 1966) § 367, pp. 326-327; cf., *Herbert v. Lando, supra,* 441 U.S. at p. 164, fn. 12 [60 L.Ed.2d at pp. 126-127]; *Reader's Digest Assn. v. Superior Court, supra,* 37 Cal.3d at pp. 257-258; *Davis v. Hearst* (1911) 160 Cal. 143, 179 [116 P. 530].)

Confusion inevitably results in libel cases involving public officials or figures seeking punitive damages because of the diverse uses of the terms "malice" or "actual malice," found in federal decisions, state decisions and various statutes. (See *Manguso v. Oceanside Unified School Dist.* (1984) 153 Cal.App.3d 574 [200 Cal.Rptr. 535] and *Burnett v. National Enquirer, Inc., supra,* 144 Cal.App.3d 991.) "Actual malice" under the *New York Times* rule establishes the minimum federal constitutional test for liability, whereas "actual malice" under Civil Code section 48a sets forth the required state elements of punitive damages against newspapers. Both tests involve the defendant's state of mind, but under *New York Times* the focus is on the defendant's knowledge or attitude toward the material published; under Civil Code section 48a the focus is on the defendant's attitude toward the plaintiff. (See *Cantrell v. Forest City Publishing Co., supra,* 419 U.S. at pp. 251-252 [42 L.Ed.2d at p. 426]; *Weingarten v. Block* (1980) 102 Cal.App.3d 129, 144-145 [162 Cal.Rptr. 701].)

The attempt to define "malice" or "actual malice" for punitive damages purposes has haunted the courts for years. The general subject matter has been exhaustively analyzed, criticized and commented upon and needs no repetition by us.[13] It suffices to say

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[13] See, e.g., Hall, *Pleading in Libel Actions in California* (1939) 12 So.Cal.L.Rev. 225; Hall, *Proof in Libel Actions in California* (1951) 24 So.Cal.L.Rev. 339; *Punitive Damages and the Intoxicated Driver: An Approach to Taylor v. Superior Court* (1979) 31 Hastings L.J. 307; Comment, *Punitive Damages and the Drunken Driver* (1980) 8 Pepperdine L.Rev. 117; Symposium: *Punitive Damages Articles* (1982) 56 So.Cal.L.Rev. 1 et seq.; Franson, *Exemplary Damages in Vehicle Accident Cases* (1975) 50 State Bar J. 93; *Smith v. Wade* (1983) 461 U.S. 30, 38-55 [75 L.Ed.2d 632, 640-651, 103 S.Ct. 1625]; *Curtis Publishing Co. v. Butts, supra,* 388 U.S. 130; *Cantrell v. Forest City*

that the courts have not been consistent with their definitions, which is understandable in this difficult area. Part of the problem is due to the fact that the terms are used and repeated interchangeably in cases involving private as well as public figures, against defendants who are not newspaper publishers in addition to those who are, and in libel cases and general tort cases alike.

In *Davis v. Hearst, supra,* 160 Cal. 143, a libel case against a newspaper in which the plaintiff recovered punitive damages, the court discussed the element of malice contained in Civil Code section 3294, which at the time contained no definition of that term.[14] "It should be apparent that the malice, and the only malice, contemplated by section 3294 is malice in fact, and that the phrase 'express or implied' has reference only to the evidence by which that malice is established; express malice thus meaning that the malice is established by express or direct evidence going to prove the actual existence of the hatred and ill-will; implied malice referring to the indirect evidence from which the jury may

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Publishing Co., supra, 419 U.S. at pp. 251-252 [42 L.Ed.2d at pp. 426-427]; *Sanborn v. Chronicle Pub. Co.* (1976) 18 Cal.3d 406, 413-414 [134 Cal.Rptr. 402, 556 P.2d 764]; *Kapellas v. Kofman, supra,*1 Cal.3d at pp. 28-31; *MacLeod v. Tribune Publishing Co.*(1959) 52 Cal.2d 536, 551-552 [343 P.2d 36]; *Davis v. Hearst, supra,* 160 Cal. at pp. 155-166; *Hearne v. De Young* (1901) 132 Cal. 357 [64 P. 576]; *Manguso v. Oceanside Unified School Dist., supra,* 153 Cal.App.3d 574; *Burnett v. National Enquirer, Inc., supra,* 144 Cal.App.3d at pp. 1005-1009; *Earp v. Nobmann* (1981) 122 Cal.App.3d 270, 285 [175 Cal.Rptr. 767]; *Bindrim v. Mitchell, supra,* 92 Cal.App.3d at pp. 74-75; *G.D. Searle & Co. v. Superior Court* (1975) 49 Cal.App.3d 22, 26-32 [122 Cal.Rptr. 218]; *McCunn v. California Teachers Assn.* (1970) 3 Cal.App.3d 956, 962-964 [83 Cal.Rptr. 846].)

[14] At that time Civil Code section 3294 stated: "In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."

It has since been amended to define malice as "conduct which is intended by the defendant to cause injury to the plaintiff or conduct which is carried on by the defendant with a conscious disregard of the rights or safety of others."

infer the existence of this malice in fact. . . . [I]t is only upon some showing regarded by law as adequate to establish the presence of malice in fact, that is the motive and willingness to vex, harass, annoy, or injure, that punitive damages have ever been awarded. . . . [T]his malice, the existence of which we have declared to be essential to a recovery in punitive damages . . . is always in its analysis the malice of the one kind, the malice of evil motive . . . since the evil motive is the controlling and essential factor which justifies such an award . . . ." (*Davis v. Hearst, supra,* at pp. 162-164.)

Davis v. Hearst, supra, continues to be cited as a basic definition of malice,[15] although in 1945 Civil Code section 48a was amended to, inter alia, substitute the phrase "actual malice" for "malice" and to define it as "that state of mind arising from hatred or ill will toward the plaintiff; . . . " The Legislature was presumably aware of the existing judicial interpretations of malice as contained in Civil Code sections 3294 and 48a, and had it intended to define the term with some lesser standard such as "wanton," "reckless" or "gross misconduct" it was free to do so.[16] " 'It is a generally accepted principle that in adopting legislation the Legislature is presumed to have had knowledge of existing

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[15] See, e.g., *Kapellas v. Kofman, supra,* 1 Cal.3d 20; *Burnett v. National Enquirer, Inc., supra,* 144 Cal.App.3d at pages 1006-1007; *G.D. Searle & Co. v. Superior Court, supra,* 49 Cal.App.3d at pages 29-30; *McCunn v. California Teachers Assn., supra,* 3 Cal.App.3d at page 962.

[16] A number of other cases over the years have articulated different standards. *Hearne v. De Young, supra,* 132 Cal. at pages 361-362, indicated that actual malice meant " 'personal hatred or ill will towards the plaintiff, *or* wanton disregard of the civil obligations of the defendants toward the plaintiff.' " (Italics ours.) Even earlier, in *Turner v. Hearst* (1896) 115 Cal. 394, 401 [47 P. 129], the court stated: "Gross negligence or carelessness of the rights of others is frequently equivalent in law to an intentional or malicious disregard of those rights." In *Donnelly v. Southern Pacific Co.* (1941) 18 Cal.2d 863, 869-870 [118 P.2d 465], it was indicated that "wanton and reckless misconduct" was sufficiently descriptive of the malice necessary to support a punitive damage award.

domestic judicial decisions and to have enacted and amended statutes in the light of such decisions as have a direct bearing upon them. [Citations.]' [Citations.]" (*Estate of McDill* (1975) 14 Cal.3d 831, 839 [122 Cal.Rptr. 754, 537 P.2d 874]; see also *Bailey v. Superior Court* (1977) 19 Cal.3d 970, 977-978 [140 Cal.Rptr. 669, 568 P.2d 394].) Thus, the Legislature has provided a specific restrictive definition of "actual malice" for purposes of Civil Code section 48a, and also taken care that such malice has to be directed toward the plaintiff(s)[17] if punitive damages are to be awarded.[18]

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[17] We do not find *Kapellas v. Kofman, supra,* 1 Cal.3d 20, to be opposed. In that case, the Supreme Court held in a case of a mother and her children suing for libel, that the publisher's malice toward the mother was sufficient to permit the children to recover punitive damages. It was not necessary for them to prove that the publisher bore them any personal hatred or ill will, but they were still required to prove actual malice toward the mother. "Further, we do not believe that the availability of exemplary damages need be predicated on a showing of malice toward each individual child in a case in which it may be shown that the defendant's misstatements about the children arose from 'hatred or ill will' toward their mother. Exemplary damages are imposed 'for the sake of example and by way of punishing a defendant' (Civ. Code, § 48a, subd. 4(c)) and one who libels an innocent party with whom he has no dispute in order to injure a third party may well be thought more reprehensible than an individual who libels only his antagonist. To interpret section 48a, subdivisions 2 and 4(d) ('no exemplary damages may be recovered unless the plaintiff shall prove that defendant made publication . . . with actual malice;' 'actual malice is that state of mind arising from hatred or ill will toward the plaintiff . . . '), as barring such recovery unless each child could show that he was the personal subject of defendant's hatred would illogically grant greater protection to the disputants than to innocent individuals who may be deliberately injured; in light of the stated purposes of exemplary damages in the same provision (§ 48a, subd. 4(d)) we cannot accept such an interpretation." (*Id.*, at p. 30, fn. 7.)

The same reasoning applies to respondents herein. The libelous charges were directed at all three of them, and their close association in the prosecution of Richard Lee made it inevitable that actual malice directed toward any of them would result in damage to all.

The record[18]herein supports respondents' position. The *knowing* publication of *false* criminal conduct as damaging to one's integrity and reputation as the charges in the instant case raises a legitimate inference of actual malice as defined by section 48a. (See, e.g., *Di Giorgio Fruit Corp. v. AFL-CIO* (1963) 215 Cal.App.2d 560, 574 [30 Cal.Rptr. 350].) In addition, the evidence supports the finding that Bergman knew that Porter's story was false—in fact, that it was entirely Bergman's creation. His testimony that he did not believe the articles were harmful to respondents was not only inherently improbable, it was contradicted by Ramirez and Burnhardt. He admitted that he knew Porter was not telling the truth about his daily meetings with Merle. He admitted that even before he collaborated on the articles he felt that respondents were "involved in a perversion and a corruption of the criminal justice system." The entire record supports a finding that Bergman acted out of ill will toward respondents. He also told Ramirez that *he did not want to be identified in the articles as the one who obtained the story from Porter.* The jury had ample evidence from which it could find actual malice as defined by Civil Code section 48a.

With regard to Ramirez and the Examiner, the record also supports a finding of actual malice under section 48a. Ramirez admitted he was attempting in the articles to convey the impression that respondents had "framed" Richard Lee. Like Bergman, Ramirez also admitted he did not believe all of Porter's initial affidavit. He also reported to his editors that Porter's statement should be viewed with skepticism. In spite of the fact that Ramirez and the Examiner knew it was important to verify Porter's claims, they were unable, in one and one-half years, to do so. In fact, all the available data indicated Porter was not telling the truth. They were advised that both Erdelatz and McCoy had good reputations, and were specifically told by their original

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[18] It might be argued that newspapers engaging in long term investigatory articles operate more like magazines and hence are not entitled to special statutory protection under these circumstances. (See e.g., *Burnett v. National Enquirer, Inc., supra,* 144 Cal.App.3d 991.) However, the statute does not make this distinction, and we are disinclined to interpret it beyond its plain terms.

informant that the State Bar was not acting on the charges made against Merle. They knew from Bergman that Porter was told he would not receive any help toward eliminating his California detainer until he produced the favorable affidavit. Ramirez and the Examiner executives met regularly with Bergman. Ramirez claimed that at one point Bergman told them Porter was confused and disorganized about the events. Bergman told them he did not want to be identified in the articles as the one who obtained the information from Porter. Yet, neither Ramirez nor anyone else from the Examiner staff ever met with Porter or corroborated any of his statements. They deliberately chose not to obtain a direct account of the meeting between Richard Lee and his first attorney, even though that attorney advised them that his information would not help Lee. They knew that, following his conviction, Lee admitted to the police that Porter had testified truthfully during Lee's murder trial.

Given these circumstances the evidence supports a finding that Ramirez and the Examiner knew that Porter's statements to Bergman were false, and that they acted out of ill will toward respondents.[19]

VIII

Appellants also contend the damages are excessive. "The determination of damages is primarily a factual matter on which the inevitable wide differences of opinion do not call for the intervention of appellate courts. [Citation.] An appellate court, in reviewing the amount of damages, must determine every conflict in the evidence in respondent's favor and give him the benefit of every reasonable inference. [Citation.] An appellate court may not interfere with any award unless 'the verdict is so large that, at first blush, it shocks the conscience and suggests passion,

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[19]Given our conculusion that the evidence supports a finding that Ramirez and the Examiner [p. 931] knew the articles were false, we need not and do not determine whether reckless disregard constitutes a state of mind sufficient to satisfy the standards of Civil Code section 48a.

prejudice or corruption on the part of the jury.' "[20] (*Niles v. City of San Rafael* (1974) 42 Cal.App.3d 230, 241 [116 Cal. Rptr. 733]; *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 927-928 [148 Cal.Rptr. 389, 582 P.2d 980]; *Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 64-67 [118 Cal.Rptr. 184, 529 P.2d 608, 65 A.L.R.3d 878]; *Schroeder v. Auto Driveaway Co.* (1974) 11 Cal.3d 908, 919 [114 Cal.Rptr. 622, 523 P.2d 662].) Furthermore, when, as in the instant case, the trial court on motion for new trial has reviewed the issue of excessive damages and has denied the motion, its decision, although not binding on us, "is to be accorded great weight because having been present at trial the trial judge was necessarily more familiar with the evidence." (*Bertero v. National General Corp., supra,* 13 Cal.3d at p. 64; *Finney v. Lockhart* (1950) 35 Cal.2d 161, 164 [217 P.2d 19]; *Moranville v. Aletto, supra,* 153 Cal.App.2d at pp. 672-673.) "[T]he more reprehensible the act, the greater the appropriate punishment . . . ." (*Neal v. Farmers Ins. Exchange, supra,* p. 928.)

We have here a situation wherein the evidence clearly and convincingly supports a finding that the affidavit of Porter which gave rise to the publication of the false charges was fabricated and encouraged by inducements to Porter of assistance in reducing his prison sentence—in short, a false charge created by a reporter for his own ulterior motives.

Each respondent testified to the shock and emotional effects they suffered as a result of the articles. They felt the publications had irrevocably damaged their respective careers and that the effects would be with them for the remainder of their lives. We also note that these particular charges are especially significant for persons in respondents' professions. The destructive effect of false accusations of brutality, dishonesty and subornation of

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[20] The record does not reveal any overt attempt by respondents to appeal to passion or to prejudice the jury. The examination and cross-examination of witnesses and the arguments of all counsel were carried out in a professional manner. In fact, the respondents' arguments on damages were understated.

perjury on the careers of police officers and attorneys is self-evident.

The purpose of exemplary damages is to punish the defendant: to make an example and thereby deter others from similar conduct. (Civ. Code, § 48a, subd. 4(c); *Gertz v. Robert Welch, Inc., supra,* 418 U.S. at p. 350 [41 L.Ed.2d at p. 811]; *Kapellas v. Kofman, supra,* 1 Cal.3d at p. 30, fn. 7.) In determining the amount of the award the jury may consider " ' . . . the character of the defendant's act, the nature and extent of the harm to the plaintiff which the defendant caused or intended to cause, and the wealth of the defendant.' " (*DiGiorgio Fruit Corp. v. AFL-CIO, supra,* 215 Cal.App.2d at pp. 580-581; *Bertero v. National General Corp., supra,* 13 Cal.3d at p. 65; *Burnett v. National Enquirer, Inc., supra,* 144 Cal.App.3d at pp. 1010-1011.) (32C) The aggregate exemplary damages in the instant case amounted to approximately one-half the compensatory award. They were also adjusted significantly between the corporate defendant and the individuals, thus demonstrating the jury's awareness of the factors involved. We must uphold an award of damages whenever possible (*Bertero v. National General Corp., supra,* 13 Cal.3d at p. 61) and "[t]he fixing of such damages has long been vested in the sound discretion of the trier of fact . . . ." " (*Id.,* at p. 64.)

In conclusion, we note that this unique record presents a textbook case of libel. It is a rare situation involving a fabrication of false charges which we assume does not recur with any frequency. We emphasize that the evidence does not establish and we do not imply that appellants Ramirez or the Examiner fabricated the Porter statement. The evidence does establish that they knew it to be false.

The judgment is affirmed.

Low, P. J., and King, J., concurred.

(Note—Appendices A through C referred to at B-1 are deleted since they are also included in Appendix A (A-44-A-69).

Appendix F

[No. A045724, First Dist., Div. Five. Mar. 1, 1991.]

Frank McCoy et al.,
Plaintiffs and Appellants,

v.

Hearst Corporation et al.,
Defendants and Respondents.

SUMMARY

After two police officers and an assistant district attorney obtained judgments in their libel actions against a newspaper and two of its reporters, the California Supreme Court reversed the judgments without directions, for insufficiency of the evidence to prove actual malice. Plaintiffs then filed a new at-issue memorandum, and defendants moved for judgment, contending the Supreme Court's decision was a final determination precluding retrial. The trial court granted the motion. (Superior Court of the City and County of San Francisco, Nos. 714-677, 714-678, 714-679, Stuart R. Pollak, Judge.)

The Court of Appeal affirmed, holding that a reversal on appeal for insufficiency of the evidence concludes the litigation just as it would have been concluded if the trial court had correctly entered judgment notwithstanding the verdict pursuant to Code Civ. Proc., § 629. The court held the rule was particularly applicable in libel actions in light of the principle encouraging early resolution of free speech cases because of the chilling effect on the exercise of U.S. Const., 1st Amend., rights caused by unnecessarily protracted litigation. (Opinion by Haning, J., with Low, P. J., concurring. Separate concurring opinion by King, J.)

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1) Appellate Review § 164 — Reversal — Effect — Insufficiency of Evidence — Libel Action. — A reversal of a judgment on appeal for insufficiency of the evidence concludes the litigation just as it would have been concluded if the trial court had

correctly entered judgment notwithstanding the verdict under Code Civ. Proc., § 629. This rule is particularly applicable in a libel action in light of the principle encouraging early resolution of free speech cases because of the chilling effect on the exercise of U.S. Const., 1st Amend., rights caused by unnecessarily protracted litigation.

[See 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 626.]

(2) Appellate Review § 164 — Reversal — Effect — Insufficiency of Evidence — Libel Action — Right to New Trial. — After reversal by the California Supreme Court of a judgment for plaintiffs in a defamation action, for insufficiency of the evidence to support a finding of actual malice, a necessary element of the causes of action, the trial court properly granted defendants' motion for judgment following plaintiffs' filing of a new at-issue memorandum. A reversal on appeal for insufficiency of the evidence concludes the litigation. On the issue of actual malice, as opposed to other factual issues, appellate courts are required to independently examine the record to determine whether it provides clear and convincing proof thereof. Since the Supreme Court had independently reviewed the record and concluded that defendants' allegedly wrongful conduct in not interviewing a witness before publishing a story did not, as a matter of law, establish actual malice within the factual matrix of the case, that conclusion was binding on the trial court.

[See Cal.Jur.3d, Appellate Review, § 588.]

COUNSEL

Charles O. Morgan, Jr., and Paul Kleven for Plaintiffs and Appellants.

Pillsbury, Madison & Sutro, Walter R. Allan, Jerome C. Dougherty, Craig E. Stewart, Margaret C. Crosby, Alan L. Schlosser, Edward M. Chen, Matthew A. Coles and Arthur Brunwasser for Defendants and Respondents.

OPINION

HANING, J. — Appellants, two police officers and an assistant district attorney, obtained judgments in their libel actions

against respondents — a newspaper and two of its reporters. The California Supreme Court reversed the judgments without directions, for insufficiency of the evidence, and the trial court then entered judgment for respondents and dismissed the actions. The sole issue on appeal is whether the unqualified reversal for insufficiency of the evidence entitles appellants to a retrial. We conclude it does not.

HISTORY

Appellants based this defamation action on a series of articles by respondents suggesting that appellants had conspired and engaged in deliberate misconduct to obtain the murder conviction of an innocent person. The jury returned verdicts in favor of appellants. Respondent newspaper's motion for judgment notwithstanding the verdict (JNOV)[1] and for new trial were denied and the judgment was affirmed by this court. The California Supreme Court reversed, concluding that "at the time the articles were published, [respondents] did not possess a subjective awareness of probable falsity" (*McCoy v. Hearst Corp.* (1986) 42 Cal.3d 835, 868 [23] Cal.Rptr. 518, 727 P.2d 711]), and therefore that "the record does not establish liability under *New York Times* [*v. Sullivan* (1964) 376 U.S. 254 (11 L.Ed.2d 686, 84 S.Ct. 710, 95 A.L.R.2d 1412)]." (*Id.*, at p. 873.) Thus, the judgment was reversed on the grounds of insufficiency of the evidence to support a finding of "actual malice," a necessary element of appellants' causes of action. (*New York Times v. Sullivan*, (1964) 376 U.S. 254 [11 L.Ed.2d 686, 84 S.Ct. 710, 95 A.L.R.2d 1412].) The Supreme Court's reversal was unqualified: "The judgment of the Court of Appeal is reversed with directions to reverse the judgment of the trial court," (*McCoy v. Hearst Corp., supra*, 42 Cal.3d at p. 873.) The remittitur then issued awarding respondents their costs.

Appellants thereafter filed a new at-issue memorandum, whereupon respondents moved for judgment, contending the Supreme Court's decision was a final determination precluding

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[1]For reasons not disclosed by the record, respondent reporters withdrew their motions for *JNOV*.

retrial. In granting the motion the trial court stated, in part: "It seems to me absolutely clear, if you take the time to read the Supreme Court decision, that this case is over. The Supreme Court held that it was its role to make findings based upon the evidence. It made the findings and ended this case . . . . [¶] . . . The Supreme Court has decided and ended this case." This appeal followed.

DISCUSSION

I

In reliance upon *Erlin v. National Union Fire Ins. Co.* (1936) 7 Cal.2d 547, 549 [61 P.2d 756] (*Erlin II*), appellants contend that an unqualified reversal remands the case for a new trial. In *Erlin v. National Union Fire Ins. Co.* (1933) 217 Cal. 374 [18 P.2d 660], The Supreme Court reversed a judgment for the plaintiff in an action to recover insurance commissions from the defendant, holding there was insufficient evidence to support the judgment — that "on the merits, the plaintiff is not entitled to recover." (*Id.*, at p. 377.) Thereafter, plaintiff brought the case for retrial and the trial court refused to hear it on the ground the Supreme Court had decided the case on its merits and did not intend to grant a retrial. The Supreme Court then reviewed the case again and held that an unqualified reversal "remands the case for a new trial and places the parties in the same position as if the case had never been tried. [Citations.] Of course, upon a retrial the decision of the appellate court becomes the law of the case upon the facts as then presented. But that law must be applied by the trial court to the evidence presented upon the second trial . . . . [¶] . . . Upon the reversal of the judgment in his favor he became entitled to a new trial and the opportunity to present evidence in support of the allegations of his complaint." (*Erlin II, supra,* 7 Cal.2d at p. 549.)

Erlin II is one of a series of California Supreme Court cases, commencing with *Stearns v. Aguirre* (1857) 7 Cal. 443, applying the general rule that an unqualified reversal remands the case for new trial. *Stearns* involved an action on a promissory note in which a judgment for the plaintiff was previously reversed without

direction by the Supreme Court for reasons relating to the manner in which a judgment was entered by the trial court. (*Stearns v. Aguirre* (1856) 6 Cal. 176.) The trial court ultimately denied a new trial and entered judgment for the defendant. Plaintiff appealed, contending he was entitled to a new trial. The Supreme Court held: "We are now called on, for the first time, to determine whether a simple ljudgment of reversal is a bar to further proceedings in the same suit, and as the point has never before been adjudicated by this Court, and we have no rule of Court or of law which would control our judgment in the premises, we think it would be more just to follow the rule of the common law on this subject, by which the parties in this suit have in all probability been governed. At common law, the Appellate Court either affirms or reverses the judgment, upon the record before it. The opinion which is rendered is advisory to the inferior Court, and after the reversal of an erroneous judgment, the parties in the Court below have the same rights that they originally had." (*Stearns v. Aguirre, supra*, 7 Cal. at p. 448.)

The statement in *Erlin II* that a reversal without directions "remands the case for a new trial and places the parties in the same position as if the case had never been tried" is understandable in the ordinary case of prejudicial error. (*Erlin II, supra*, 7 Cal.2d at p. 549.) In such a situation an error of law has occurred during the proceedings which prevented the appellant from receiving a fair trial. A reversal under these circumstances informs the trial court that a proper motion for new trial, had it been made, should have been granted. However, a reversal for insufficiency of the evidence is based on the fact that the plaintiff's evidence does not, as a matter of law, support the plaintiff's cause of action. When a judgment for the plaintiff is reversed for insufficiency of the evidence the appellate court is, in effect, advising the trial court that a nonsuit, directed verdict or JNOV should have been entered.

When the plaintiff has had full and fair opportunity to present the case, and the evidence is insufficient as a matter of law to support plaintiff's cause of action, a judgment for defendant is required and no new trial is ordinarily allowed, save for newly discovered evidence. (See Code Civ. Proc., §§ 629, 657; 8 Witkin,

Cal. Procedure (3d ed. 1985) Attack on Judgment in Trial Court, § 18 et seq.)[2] When trial courts grant nonsuits or judgments notwithstanding the verdict based on insufficiency of the evidence and are affirmed on appeal, new trials do not follow as a matter of course. Certainly, where the plaintiff's evidence is insufficient as a matter of law to support a judgment for plaintiff, a reversal with directions to enter judgment for the defendant is proper. (See *Cocking v. State Farm Mut. Automobile Ins. Co.* (1970) 6 Cal.App.3d 965, 971 [86 Cal.Rptr. 193]; *Venne v. Standard Accident Ins. Co.* (1959) 171 Cal.App.2d 242, 248 [340 P.2d 30]; *Mayer v. Beondo* (1948) 83 Cal.App.2d 665, 670-671 [189 P.2d 327]; 9 Witkin, Cal. Procedure (3d ed. 1985) § 631.) It is anomalous to end the case when the trial court correctly enters a nonsuit or JNOV on the ground that the plaintiff has, as a matter of law, failed to prove a cause of action, but to allow plaintiff another trial when the appellate court makes the same determination, since the standard applied by the respective courts is virtually identical. (See *Dailey v. Los Angeles Unified Sch. Dist.* (1970) 2 Cal.3d 741, 745 [87 Cal.Rptr. 376, 470 P.2d 360]; *Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 906 [215 Cal.Rptr. 679, 701 P.2d 826].)

For these reasons, it appears more reasonable that when the plaintiff has had full and fair opportunity to present his or her case, a reversal of a judgment for the plaintiff based on insufficiency of the evidence should place the parties, at most, in the position they were in after all the evidence was in and both sides had rested. A judgment for the defendant would then be entered, and a new trial permitted only for newly discovered evidence. (§ 657, subd. 4.) A new trial under such circumstances is governed by the law of the case doctrine as defined by the appellate decision (*Erlin II, supra,* 7 Cal.2d at p. 549; see also *Hall v. Superior Court* (1955) 45 Cal.2d 377, 381 [289 P.2d 431]; *Wells v. Lloyd* (1942) 21 Cal.2d 452, 455 [132 P.2d 471]), and the law of the case doctrine applies to an appellate decision on the sufficiency of the evidence. (*Hall v. Superior Court, supra.*) "The

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[2]Unless otherwise indicated, all further statutory references are to the Code of Civil Procedure.

question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law." (*Harte-Hanks, Inc. v. Connaughton* (1989) 491 U.S. 657, ___ [105 L.Ed.2d 562, 587, 109 S.Ct. 2678, 2694]; *Milkovich v. Lorain Journal Co.* (1990) 497 U.S. ___, ___ [111 L.Ed.2d 1, 17, 110 S.Ct. 2695, 2705].) Consequently, retrying the case on the same evidence is a needless exercise, since the law of the case would compel another decision for the defense.

The obvious problems caused by rigid application of the *Erlin II* rule has led to recognition of an exception. *Stromer v. Browning* (1968) 268 Cal.App.2d 513, 518-519 [74 Cal.Rptr. 155], analyzed *Erlin II* as follows: "It has been stated: 'An unqualified reversal *ordinarily* has the effect of remanding the cause for a new trial on all of the issues *presented by the pleadings.*' . . . But the rule that an unqualified reversal without directions remands the case and sets it at large for further trial is a *general* one . . . . [¶] The fact that the rule . . . is a 'general' rule implies that it has limitations. One limitation is that a case is to be set at large for retrial only when that is the intent of the appellate court. 'Judgment reversed' at the end of an opinion is, of course, strong indication of such intent. But when the opinion as a whole establishes a contrary intention, the rule is inoperative. To hold otherwise would be to make a fetish of form." The *Stromer* exception has been adopted and applied by other Courts of Appeal. (See, e.g., *Moore v. City of Orange* (1985) 174 Cal.App.3d 31, 36-37 [219 Cal.Rptr. 301]; *No Oil, Inc. v. City of Los Angeles* (1984) 153 Cal.App.3d 998, 1004 [200 Cal.Rptr. 768]; *Salaman v. Bolt* (1977) 74 Cal.App.3d 907, 915 [141 Cal.Rptr. 841]; *In re Marriage of Steinberg* (1977) 66 Cal.App.3d 815, 820-822 [136 Cal.Rptr. 299]; *Barth v. B.F. Goodrich Tire Co.* (1971) 15 Cal.App.3d 137, 141-142 [92 Cal.Rptr. 809].)

We conclude we need not decide whether *Stromer* applies, since we are of the opinion that insofar as reversals for insufficiency of the evidence are concerned, *Erlin II* has been modified by statute. At the time *Erlin II* was decided, section 629 provided that the trial court could, in its *discretion,* enter a JNOV only when the aggrieved party had previously moved unsuccessfully for

a directed verdict, and if a motion for JNOV was denied it was *discretionary* with the appellate court to "order judgment to be so entered when it appears from the whole evidence that a verdict should have been so directed at the trial . . . ."

As a result of post-*Erlin II* amendments, section 629 now provides, in part: "The [trial] court, . . . , either of its own motion, . . . , or on motion of a party against whom a verdict has been rendered, *shall* render judgment in favor of the aggrieved party notwithstanding the verdict whenever a motion for a directed verdict for the aggrieved party should have been granted *had* a previous motion been made . . . ." (Italics supplied.) The appellate courts' duty was also rendered mandatory: "If the motion for [JNOV] be denied and if a new trial be denied, *the appellate court shall*, when it appears that the motion for [JNOV] should have been granted, *order judgment to be so entered* on appeal . . . ." (§ 629, italics supplied.)

(1) Consequently, as stated by Division Two of this court in *Bank of America v. Superior Court* (1990) 220 Cal.App.3d 613, 624 [269 Cal.Rptr. 596]: "The effect of section 629 is that a reversal on appeal for insufficiency of the evidence concludes the litigation just as it would have been concluded if the trial court had correctly entered [JNOV]." This rule is particularly applicable in libel actions in light of the principle encouraging early resolution of free speech cases because of the chilling effect upon the exercise of First Amendment rights caused by unnecessarily protracted litigation. (*Good Government Group of Seal Beach, Inc. v. Superior Court* (1978) 22 Cal.3d 672, 684-685 [150 Cal.Rptr. 258, 586 P.2d 572], cert. den., (1979) 441 U.S. 961 [60 L.Ed.2d 1066, 99 S.Ct. 2406]; *Miller v. National Broadcasting Co.* (1986) 187 Cal.App.3d 1463, 1479 [232 Cal.Rptr. 668, 69 A.L.R.4th 1027]; *Sipple v. Chronicle Publishing Co.* (1984) 154 Cal.App.3d 1040, 1046 [201 Cal.Rptr. 665].)

II

(2) Appellants argue that neither the *Kruse* rationale nor section 629 is applicable here. Their argument is as follows: (1) In the ordinary JNOV case, the trial court's power is the

same as when considering a directed verdict — the court cannot weigh the evidence or judge the credibility of witnesses; the evidence must be viewed in the light most favorable to the prevailing party, and if any substantial evidence, or reasonable inferences to be drawn therefore exist to support the verdict, JNOV is improper (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 110 [120 Cal.Rptr. 681, 534, P.2d 377, 74 A.L.R.3d 1282]); and (2) in the instant case the Supreme Court engaged in a de novo review under a different standard.

Appellants' first point is answered by the fact that libel actions governed by the *New York Times* standard are not ordinary cases. All judges have a responsibility in these cases to independently examine the record to determine whether it provides clear and convincing proof of actual malice (*Bose Corp. v. Consumers Union of U.S., Inc.* (1984) 466 U.S. 485, 498-511 [80 L.Ed.2d 502, 514-524, 104 S.Ct. 1949]; *New York Times v. Sullivan, supra*, 376 U.S. at pp. 284-285 [11 L.Ed.2d at pp. 708-710]), and thus the standards for reviewing motions for JNOV or nonsuit in such actions involve a de novo review of the evidence of actual malice — an element which is not applied to the same motions in other cases.

On their second point, appellants focus on the Supreme Court's statement that its "constitutional responsibility" required it "to step beyond the unusual confines of appellate review.... [¶] This court is not bound to consider the evidence of actual malice in the light most favorable to [appellants] or to draw all permissible inferences in favor of [appellants] .... [¶] Finally, if warranted, this court may do as the *Bose* [*Corp. v. Consumers Union of U.S., Inc., supra*, 466 U.S. 485] court did ... and substitute its own inferences on the issue of actual malice for those drawn by the trier of fact." (*McCoy v. Hearst Corp., supra*, 42 Cal.3d at p. 846, fn. omitted.)

Appellants contend the foregoing language demonstrates that the Supreme Court engaged in impermissible fact-finding, and in support of their contention rely on *Anderson v. Liberty Lobby, Inc.* (1986) 477 U.S. 242, 255 [91 L.Ed.2d 202, 106 S.Ct. 2505], wherein the United States Supreme Court stated, in a libel case: "Credibility determinations, the weighing of the evidence, and the

drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. [Citation.]"

In *Anderson*, the high court was reviewing a decision of the Circuit Court of Appeals, which had affirmed the trial court's grant of summary judgment in a public-figure libel case, and the issue was "whether the clear-and-convincing-evidence requirement must be considered by a court ruling on a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure in a case to which *New York Times* [*v. Sullivan supra*, 376 U.S. 254] applies."[3] *Anderson* held that it did. (*Anderson v. Liberty Lobby, Inc., supra*, 477 U.S. at p. 244 [91 L.Ed.2d at p. 209].)

However, as we have stated, on the issue of actual malice, as opposed to other factual issues in the case, the courts are required to independently examine the record to determine whether it provides clear and convincing proof thereof. (*New York Times v. Sullivan, supra*, 376 U.S. at pp. 284-285 [11 L.Ed.2d at pp. 708-710]; *Bose Corp. v. Consumers Union of U.S., Inc., supra*, 466 U.S. at pp. 498-511 [80 L.Ed.2d at pp. 514-524].)

III

Appellants also contend that reversal and remand for new trial is compelled by *Harte-Hanks, Inc. v. Connaughton, supra*, 491 U.S. 657, which was decided after the California Supreme Court's decision herein. Appellants rely on a fact in *Harte-Hanks* (the failure of the libel defendants to interview a critical witness) which is similarly present in the instant case. However, our

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[3]Rule 56 of the Federal Rules of Civil Procedure is similar to California's summary judgment statute. (§ 437c.) Subdivision (c) of this rule provides that summary judgment "shall be rendered forthwith if the [supporting and opposing papers] show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Supreme Court has independently reviewed the record and concluded that the failure of the instant respondents to interview the witness in question does not, as a matter of law, establish a case of actual malice within the factual matrix of this case, and we are bound by that decision. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450 [20 Cal.Rptr. 321, 369 P.2d 937].)

The judgment is affirmed.

Low, P. J., concurred.

KING, J. — I concur but write separately to urge the California Supreme Court to grant review in this case.

The real issue is what the California Supreme Court intended when it ordered the unqualified reversal. While we can only speculate as to that intent, the California Supreme Court can speak definitively. This case was particularly suited for transfer to the California Supreme Court, before our decision, upon petition by a party. (Cal. Rules of Court, rule 27.5.) Absent such a petition we had no choice but to try cutting the Gordian knot, but unlike Alexander the Great we can now ask Gordius himself to untie it.

I also suggest that, whatever the California Supreme Court's intent, an unusual equitable consideration favors a grant of review and retrial order in this case. In its prior opinion, the California Supreme Court misread a pivotal United States Supreme Court decision, *Bose Corp. v. Consumers Union of U.S. Inc.* (1984) 466 U.S. 485, 512-513 [80 L.Ed.2d 502, 514-524, 104 S.Ct. 1949], and consequently misinterpreted the standard of independent appellate review in First Amendment libel cases.

The trial court in *Bose* had determined that certain testimony as to lack of malice was not credible. In its *McCoy* opinion, the California Supreme Court stated hat in *Bose* the United States Supreme Court rejected the trial court's credibility determination. (*McCoy v. Hearst Corp.* (1986) 42 Cal.3d 835, 844 [231 Cal.Rptr. 518, 727 P.2d 711].)

Subsequently, however in *Harte-Hanks, Inc. v. Connaughton* (1989) 491 U.S. 657, ___, fn. 35 [105 L.Ed.2d 562, 589, 109 S.Ct. 2678], the United States Supreme Court repudiated this interpre-

tation of *Base*. The petitioner in *Harte-Hanks* had argued, as the California Supreme Court stated in *McCoy*, that the *Bose* decision had rejected the trial court's credibility determination. The *Harte-Hanks* opinion disapproved this interpretation of *Bose*, explaining that in *Bose* the court had actually *accepted* the trial court's credibility determination but had been unwilling to infer actual malice. (*Ibid.*) The *Harte-Hanks* opinion reiterated that even within the context of independent appellate review, substantial deference is to be afforded to trial court credibility determinations "because the trier of fact has had the 'opportunity to observe the demeanor of the witnesses . . . .' " (*Id.* at p. ___ [105 L.Ed.2d at p. 589], quoting *Bose Corp. v. Consumers Union of U.S. Inc., supra*, 466 U.S. 485 at pp. 499-500 [80 L.Ed.2d at pp. 515-516].)

The California Supreme Court's erroneous reading of *Bose* was apparently critical to its decision. The court said, "Both the principles announced in *Bose* and *the manner in which the high court carried out its functions of independent review*, are the guide to be followed in reviewing the evidence at hand." (*McCoy v. Hearst Corp., supra*, 42 Cal.3d at p. 845, italics added.) Had the California Supreme Court correctly interpreted *Bose* and applied the standard of independent appellate review with due deference to trial court credibility determinations, it might well have affirmed the judgment. It is, of course, too late to correct this mistake, but the California Supreme Court can do the next best thing by ordering a retrial.

Appendix G

First Appellate District, Division Five, No. A045724

S020443

In The Supreme Court Of The State Of California

In Bank

Frank McCoy et al.,
Appellants,

v.

The Hearst Corporation, etc, et al.,
Respondents.

[Filed May 30, 1991]

Appellants' petition for review denied.

Panelli, J. did not participate.

LUCAS
Chief Justice

(2)

No. 91-889

In The

Supreme Court of the United States

October Term, 1991

FRANK McCOY, EDWARD ERDELATZ, and PIERRE MERLE,

Petitioners,

vs.

THE HEARST CORPORATION, a California corporation, SAN FRANCISCO EXAMINER, RAUL RAMIREZ and LOWELL BERGMAN,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California

BRIEF OF RESPONDENTS RAUL RAMIREZ AND LOWELL BERGMAN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MARGARET C. CROSBY*
ALAN L. SCHLOSSER
EDWARD M. CHEN
MATTHEW A. COLES
ANN BRICK
American Civil Liberties Union Foundation of Northern California, Inc.
1663 Mission Street, Suite 460
San Francisco, CA 94103
Telephone: (415) 621-2493

ARTHUR BRUNWASSER
240 Stockton Street, Third Floor
San Francisco, CA 94108
Telephone: (415) 391-2203

Attorneys for Respondents Raul Ramirez and Lowell Bergman

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Whether this Court has jurisdiction to review a state court order which, applying a state procedural rule on finality of civil judgments, summarily rejected a petition to reinstate a libel judgment entered in 1979 and unanimously reversed by the California Supreme Court in 1986.

Whether the First Amendment to the United States Constitution compels a state court to disregard its rules of finality to reconsider a 1986 decision in a public official libel case, on the claim of a litigant that subsequent legal developments indicate that the court erred in its review of the trial record on the first appeal.

LIST OF PARTIES

The parties to this proceeding in the California Court of Appeal were:

Frank McCoy, Edward Erdelatz, and Pierre Merle, plaintiffs and petitioners;

The Hearst Corporation, San Francisco Examiner, Raul Ramirez and Lowell Bergman, defendants and respondents.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

California Rules of Court, Rule 25:

(a) A remittitur shall issue after the final determination of (1) Supreme Court review of a decision of a Court of Appeal; (2) any appeal; (3) any original proceeding in which an alternative writ or order to show cause has been issued addressed to a lower court, board or tribunal; or (4) any original proceeding determining on the merits the validity of the decision of a lower court, board or tribunal without issuance of an order to show cause or alternative writ. A remittitur shall not be issued when an original petition is summarily denied.

Unless otherwise ordered, the Clerk of the Supreme Court shall issue the remittitur when a judgment of that court becomes final, and the clerk of a Court of Appeal shall issue the remittitur (1) upon the expiration of the period during which review in the Supreme Court may be determined, including any extension of the period granted in the particular cause or (2) as provided in this subdivision or Rule 29.4(c). The remittitur shall be deemed issued on the clerk's entry in the record of the case, and shall be transmitted immediately, with a certified copy of the opinion or order, to the lower court,

board or tribunal. On Supreme Court review of a decision of a Court of Appeal the remittitur shall, unless otherwise ordered, be addressed to the Court of Appeal, accompanied by a second certified copy of the remittitur and by two certified copies of the opinion or order; and the Court of Appeal shall issue its remittitur forthwith after an unqualified affirmance or reversal of its judgment by the Supreme Court, or after finality of such further proceedings as are mandated by the Supreme Court.

Whenever the judgment of the reviewing court changes the length of a sentence to state prison or changes the applicable credits, or changes the maximum permissible period of confinement of a person committed to the custody of the Youth Authority, without requiring further hearing in the trial court, the clerk of the reviewing court shall also transmit a copy of the remittitur and the opinion to the Department of Corrections or to the Youth Authority.

(b) For good cause shown, or on stipulation of the parties, the Supreme Court may direct the immediate issuance of a remittitur. The Court of Appeal may direct the immediate issuance of a remittitur on stipulation of the parties.

(c) A reviewing court, for good cause, may stay the issuance of a remittitur for a reasonable period.

(d) A remittitur may be recalled by order of the reviewing court on its own motion, on motion or petition after notice supported by affidavits, or on stipulation setting forth facts which would justify the granting of a motion.

(e) Forthwith upon issuance of the remittitur, the clerk of the reviewing court shall mail notice to the parties that it has been issued.

STATEMENT OF THE CASE

This is a public official libel case brought by two homicide inspectors and an assistant district attorney against two reporters, a San Francisco newspaper, and its parent corporation, for a series of investigative news articles questioning the fairness of a murder conviction. The case, now in its sixteenth year, has been heard in three essentially distinct phases by California trial and appellate courts: (1) A 1979 trial, followed by appeals that culminated in a unanimous reversal of a judgment for petitioners by the California Supreme Court (*"McCoy I"*); (2) petitioners' unsuccessful attempts to obtain a second trial (*"McCoy II"*); and (3) petitioners' unsuccessful attempts to reinstate the 1979 judgment (*"McCoy III"*).

A. McCoy I.

1. The Articles.

The libel suit was based on a series of articles, written by respondents Raul Ramirez and Lowell Bergman, and published in the San Francisco *Examiner* in 1976. The articles probed the trial of Richard Lee, who was convicted of the murder of a Chinese youth on July 13, 1972, outside of a housing complex in the Chinatown section of

San Francisco. (C.T. 44-69).[1] During an 18-month investigation, the reporters interviewed 40 people (App. D-18-22), including two eyewitnesses to the killing who provided the reporters with affidavits. The first eyewitness, a sixteen-year-old girl, asserted that she had been pressured and misled by the police and prosecutor in the case into identifying Richard Lee as the assailant at trial. (R.T. 2251, 2725, 3984; C.T. 82, 83, 104, 105). The second eyewitness swore that Richard Lee, whom he knew well, was not present or involved in the shooting and that the police had rebuffed his attempt to clear Lee's name. (R.T. 2178-83; C.T. 109).

The third affidavit obtained by the reporters was executed by Thomas Porter, the star prosecution witness at the Lee trial. Porter testified as a jailhouse informant, telling the criminal jury that while he and Lee were cellmates during pretrial detention, Lee had confessed to the murder. In 1975, Bergman wrote a letter to Porter, then incarcerated in a federal facility in Indiana, to inquire whether Porter would be interested in discussing the case. (App. D-13.) Within days, Porter telephoned Bergman to say that he had lied at the Lee trial in response to threats of violence and promises of leniency from the police and prosecutor, and felt great remorse. (R.T. 1026-27, 1201-02.) Porter subsequently executed a detailed affidavit, drafted by an Indiana attorney, for use

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[1] The record is cited as follows: Petitioners' Appendix is designated "App." The Petition is designated "Pet." The record of pleadings filed below is designated "C.T." The reporter's transcript of the 1979 trial is designated "R.T."

in connection with a writ of habeas corpus on Lee's behalf. (R.T. 440-53; C.T. 75-80, Pl. Ex. 61.)

Lee's petition for a writ of habeas corpus, supported by the affidavits of the two eyewitnesses and Porter, was filed several days after publication of the articles. In connection with the habeas petition, after meeting with representatives of the California Attorney General's office, Porter executed a second affidavit asserting that he had testified truthfully in the murder trial. (R.T. 3795.)

The reporters also interviewed attorneys, journalists, social workers, police officers, and leaders of and experts on San Francisco's Chinatown community. (C.T. 18-22.) At the close of their 18-month investigation, they believed that the evidence that they had accumulated raised serious questions about the validity of Lee's conviction, about San Francisco's criminal justice system and about the treatment of members of racial minorities as accused defendants. (App. D-18-21.) They believed that these issues should be brought to the public's attention. (R.T. 2273-74, 2688, 2743-45.) The *Examiner* published the articles as a three-part series from May 19 through 21, 1976. (App. D-44-69.)

2. The Defamation Case.

Petitioners filed three separate libel actions on November 18, 1976, in San Francisco Superior Court, which were consolidated for further pretrial proceedings and trial. (C.T. 62-66.) The Superior Court ruled that petitioners would be held to satisfy the constitutional standard required of public officials seeking damages for defamation. (C.T. 235.) On April 18, 1979, after a five-

week trial, the jury returned verdicts in favor of the three petitioners totalling $4,560,000. (C.T. 329-331.) The Court of Appeal upheld the judgment on October 23, 1985 (App. E), and denied petitions for rehearing on November 22, 1985.

The California Supreme Court granted review on January 23, 1986. On November 13, 1986, the Court unanimously reversed the judgment, ruling that petitioners had ~~failed~~ to satisfy the constitutional standards for a judgment in a public official libel suit. *McCoy v. Hearst Corp.*, 48 Cal. 3d 835, 231 Cal. Rptr. 518, 727 P. 2d 711 (1986). (App. D.) The Court also ruled that the trial court had erred in excluding testimony about the source of a published statement that petitioner Merle had been the subject of a State Bar disciplinary proceeding (App. D-38-40) and erred in instructing the jury on punitive damages under the wrong California statute. (App. D-40-43.) The Court left several issues unresolved, including state law privilege, evidentiary rulings, and instructions. (App. D-40, n.34.) The remittitur was issued on December 29, 1986. (C.T. 468-468A.)

Petitioners filed a petition for writ of certiorari on February 11, 1987. The issue raised in the petition was whether the California Supreme Court's review of the 1979 trial record complied with the principles of *Bose Corporation v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984). This Court denied the petition on May 4, 1987. *McCoy v. Hearst Corp.*, 481 U.S. 1041 (1987). (App. C.)

B. McCoy II.

On December 15, 1988, more than two years after the California Supreme Court had found the articles to be constitutionally protected, petitioners requested calendar preference for a second trial in the case. Relying on a 1936 opinion from the California Supreme Court, *Erlin v. National Union Fire Ins. Co.*, 7 Cal. 2d 547, 61 P. 2d 756 (1936), petitioners claimed that because the Supreme Court's opinion in *McCoy* did not include an express directive for entry of judgment, petitioners were entitled to try the case again. (C.T. 581-615.) Respondents argued that statutory and common law developments since 1936 precluded reliance on the phrasing of the closing words of the opinion in determining its disposition, and that final judgment should be entered for the defense in accordance with the clear intent of the Supreme Court. (C.T. 479-580, 622-710.) The Superior Court granted defendants' motions (C.T. 711-712) and entered judgment on March 15, 1989. (C.T. 713-714.) The Court of Appeal unanimously affirmed that judgment on March 1, 1991. *McCoy v. Hearst Corp.*, 227 Cal. App. 3d 1657, 278 Cal. Rptr. 596 (1991). (App. F.) The California Supreme Court, without dissent, denied review of that decision on May 31, 1991. (App. G.)

C. McCoy III.

On May 16, 1991, petitioners filed a motion in the Court of Appeal to recall the remittitur issued in *McCoy I* in 1986. Petitioners claimed that the state Supreme Court's review of the record was inconsistent with principles articulated in this Court's decision, three years later,

in *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989). Thus, petitioners contended that the 1979 judgment unanimously reversed by the Supreme Court should be reinstated.

Respondents opposed the petition on grounds that state courts lacked jurisdiction, under California procedural law, to recall a remittitur for the purpose of reconsidering the merits of an appeal that had become final. Respondents also contested petitioners' assertion that the state Supreme Court's record review has been improper, and argued that the 1979 judgment could not be reinstated because *McCoy I* established, independent of its constitutional holding, that the judgment was flawed by an erroneous instruction and discovery sanction.

The Court of Appeal, without dissent, summarily denied petitioners' motion to recall the remittitur on June 10, 1991. (App. A.) The California Supreme Court, without dissent, rejected petitioners' request for review of the Court of Appeal's summary denial of the motion to recall the remittitur on August 28, 1991. (App. B.)

Petitioners now seek this Court's review of the Court of Appeal order summarily denying their motion to recall the remittitur. They filed their petition for a writ of certiorari to the California Court of Appeal on November 26, 1991.

REASONS FOR DENYING THE WRIT

Petitioners' second petition for certiorari does not satisfy either the jurisdictional requisites or the substantive standards for this Court's review.

First, the California courts' summary denial of petitioners' motion to recall the remittitur plainly rests on adequate and independent state grounds. California procedural law prohibits recall of remittitur to reconsider the merits of civil appeals that have become final. The orders entered in this case reflect consistent and uniform California precedent on finality of civil actions. This procedural rule promotes the state's significant interest in conserving judicial resources.

Second, petitioners do not properly assert any federal constitutional rights. The First Amendment issue presented in the petition for certiorari is precisely the issue that this Court declined to hear in 1987: whether the California Supreme Court conducted an appropriate review of the 1979 trial record. The First Amendment does not entitle petitioners, as public official libel plaintiffs, to a constitutionally determined scope of appellate review. Accordingly, the California courts' refusal to conduct a second review of the trial record of this defamation suit infringes no federal constitutional rights.

I.

THE CALIFORNIA COURT OF APPEAL'S SUMMARY DENIAL OF PETITIONERS' MOTION TO RECALL THE REMITTITUR RESTS ON ADEQUATE AND INDEPENDENT STATE PROCEDURAL GROUNDS

In requesting California courts to recall the *McCoy I* remittitur[2] to reconsider the merits of an appeal that had been final for five years, petitioners were seeking a result that was plainly unauthorized by state law. California appellate courts were divested of jurisdiction over *McCoy I* in 1986 by issuance of the remittitur. Their residual jurisdiction was limited to recall a remittitur issued by inadvertence or fraud. As the California Supreme Court has defined the extremely narrow basis for recall of remittitur under state law:

> [T]he extraordinary remedy by motion to recall the remittitur may be invoked only in cases of fraud or imposition practiced upon the court or upon the opposite party, or where the judgment was based on a mistake of fact or occurred through inadvertence. None of these is present when the court renders the judgment advisedly upon the case as presented by the parties. . . . Mistake or inadvertence is not supported by a declaration that on the presentation of the same

---

[2] In California, remittitur "is the term employed to designate the judgment of the appellate tribunal which is authenticated to the court from which the appeal is taken or over which its controlling jurisdiction is exercised, and corresponds to the 'mandate' used in the practice of the United States Supreme Court." *Noel v. Smith*, 2 Cal. App. 158, 162, 83 P. 167 (1905). Issuance and recall of remittitur in California appellate courts are governed by California Rules of Court, Rule 25.

> facts and matters in issue the court now arrives at a different conclusion on the merits. A motion to recall the remittitur is not justified as an opportunity to the parties to relitigate their cause nor to the appellate court to redetermine the merits.
>
> *Southwestern Inv. Corp. v. City of Los Angeles*, 38 Cal. 2d 623, 629-630, 241 P. 2d 985 (1952).

Petitioners plainly failed to satisfy the grounds for recall of remittitur. They did not claim fraud or inadvertence, but rather that the California Supreme Court had improperly reviewed the 1979 libel record. They sought to "relitigate their cause." Under settled California doctrine, state courts lacked jurisdiction to "redetermine the merits" of the case through recall of remittitur. "[A]n appellate court has no appellate jurisdiction of its own judgment; and it has no power to recall the remittitur for the purpose of reconsidering or modifying its own judgment on the merits." *Southwestern Investment*, 38 Cal. 2d at 629.

No California case has authorized the relitigation of final civil judgments through recall of remittitur. Such claims are uniformly rejected. In *Kohle v. Sinnett*, 136 Cal. App. 2d 34, 288 P. 2d 139 (1955), for example, the court stated:

> The office of the remittitur is to return the proceedings which have been brought up by the appeal to the court below, and when the remittitur has been duly filed the proceedings from that time are pending in that court and not in this; and in regard to them it is not competent

> for this court to make any further order. (citation omitted.) The established grounds for recall of remittitur . . . constitute an exception to the general rule and the exception does not embrace a relitigation of issues that have in truth been considered and decided by the appellate court even if it could be successfully argued that the decision was erroneous.
>
> We think it apparent that the statement of grounds for recall show that if granted the court could do no more than reconsider that which it heretofore considered when rendering its decision. We have no power to recall the remittitur for such purpose.
>
> 136 Cal. App. 2d at 37.

California courts have specifically rejected efforts of disappointed civil litigants to reopen civil appeals on the theory that an appellate court improperly reviewed the record. *See, eg., Davis v. Basalt Rock Co.*, 114 Cal. App. 2d 300, 250 P. 2d 254 (1952).

California's prohibition against relitigation of the merits of an appeal through recall of remittitur was plainly the basis for the orders entered in this case. The state appellate courts refused to hear petitioners' motion because no procedural mechanism exists for reinvesting an appellate court with jurisdiction to reconsider its own decision.[3]

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[3] In addition, the state Court of Appeal clearly lacked jurisdiction under California law to disturb a judgment issued by the California Supreme Court. See *McCoy II*, App. F-10-11. This also furnishes an independent state basis for the Court of Appeal's decision.

California's procedural doctrine on finality of civil cases, independent of federal principles, is adequate to support the challenged orders. Because the rulings rest on adequate and independent state law, review by this Court is inappropriate:

> It is, of course, a familiar principle that this court will decline to review state court judgments which rest on independent and adequate state grounds, even where those judgments also decide federal questions. The principle applies not only in cases involving state substantive grounds, but also in cases involving procedural grounds.
>
> *Henry v. Mississippi*, 379 U.S. 443, 446 (1965).

A state procedural doctrine furnishes an adequate and independent state grounds for decision, provided that it is uniformly invoked, *Hathorn v. Lovorn*, 457 U.S. 255, 262 (1982), and promotes a legitimate state interest, *Michigan v. Tyler*, 436 U.S. 499, 512 n. 7 (1978). California's rule of finality, applied to bar recall of the 1986 remittitur in this case, clearly satisfies those requirements.

In refusing to entertain petitioners' motion, California courts followed uniform precedent limiting recall of remittitur to the extraordinary situation of fraud or inadvertence. Petitioners are unable to cite any California authority, because none exists, for recall of remittitur to reopen a closed case years later, for the sole purpose of

readjudicating the merits of a civil appeal.[4] Petitioners sought a novel expansion of a strictly limited procedure. The challenged orders therefore represent application of settled state procedural law.

California's limitations on recall of remittitur promote the state's policy of finality in civil lawsuits. As a large state with congested courts, California obviously has a significant interest in preventing unnecessary and duplicative litigation. The state's highest court has recently stressed that "enhancing the finality of judgments and avoiding an unending roundelay of litigation" is an important policy. *Silberg v. Anderson*, 50 Cal. 3d 205, 214, 266 Cal. Rptr. 638, 786 P. 2d 365 (1990).

In claiming that the United States Constitution compels California to abandon its rules on finality, petitioners are seeking an extraordinary federal intrusion into state autonomy. As this Court has noted:

> Without any doubt it rests with each State to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied to its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case

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[4] Petitioners' own briefs provide the clearest evidence of the unprecedented nature of their request to reconsider the merits of their case: The only authorities cited to the state courts, and to this Court, are criminal cases, in which recall of remittitur was authorized as an ancillary remedy to a writ of habeas corpus. Pet. 7-8, citing *People v. Mutch*, 4 Cal. 3d 389, 93 Cal. Rptr. 721, 482 P. 2d 633 (1971); *People v. Valenzuala*, 175 Cal. App. 3d 381, 222 Cal. Rptr. 405 (1985).

turns entirely upon questions of local or general law.

> *Wolfe v. North Carolina*, 364 U.S. 177 (1965).

The challenged order summarily denying petitioners' motion to recall the 1986 remittitur is thus beyond the jurisdiction of this Court.

II.

THE RULING BELOW, ENFORCING CALIFORNIA'S RULES OF FINALITY, DOES NOT IMPLICATE FIRST AMENDMENT RIGHTS

Petitioners have pursued this public official libel case for over 15 years. They have consumed a substantial share of California's judicial resources. Nothing in the United States Constitution compels the state appellate courts to review the 1979 trial record yet another time.

Petitioners make the extraordinary claim that the First Amendment requires the California Supreme Court to conduct a second review of a 4500-page trial record, five years after the case was closed. This contention fundamentally misperceives the interaction of the First Amendment with state tort remedies for defamation.

In *Bose* and *Harte-Hanks*, this Court addressed the standard of review required by the First Amendment when libel *defendants* appeal jury awards against them. Nothing in the First Amendment, however, entitles libel *plaintiffs* to a constitutionally determined standard of review. Indeed, California could abolish the tort action for defamation tomorrow without offending the First

Amendment. Thus, petitioners' contention that the California Supreme Court failed to give proper deference to the jury's determinations in this case, even if true,[5] raises at most a state law issue.

It follows, therefore, that the California Supreme Court's unanimous decision after review of the 1979 trial record infringes no First Amendment rights. The orders subsequently entered by California courts, refusing to reopen the case, also infringe no First Amendment rights. To the contrary, those rulings foster freedom of the press, by preventing unnecessary protraction of this 15-year-old public official libel case.

CONCLUSION

Because the California court orders reflect settled state procedural law, and raise no federal issues, there is

---

[5] Petitioners' characterization of the California Supreme Court's 1986 decision is inaccurate. (Pet. 7-9.) The Court did not disturb the jury's credibility choice in concluding that petitioners had failed to establish constitutional malice. Petitioners' case for malice depended on their proving that reporter Lowell Bergman knowingly solicited a false affidavit from inmate Henry Porter. The court ruled that *Porter's* testimony, even if believed, was insufficient to establish clearly and convincingly that Bergman asked him to furnish a false affidavit. (App. D-27-31.) Performing the independent review mandated by *Harte-Hanks*, the court properly concluded that testimony critical to petitioners' case, even if uncontradicted, was inadequate to establish constitutional malice. *Cf. Harte-Hanks*, 491 U.S. at 689 n. 35, citing *Bose*, 466 U.S. at 512.

no basis for this Court's review. Accordingly, the petition for writ of certiorari should be denied.

Respectfully submitted,

MARGARET C. CROSBY*
ALAN L. SCHLOSSER
EDWARD M. CHEN
MATTHEW A. COLES
ANN BRICK
American Civil Liberties Union Foundation of Northern California, Inc.

ARTHUR BRUNWASSER

Attorneys for Respondents Raul Ramirez and Lowell Bergman

*Counsel of Record

San Francisco, California
December 24, 1991

(3)

No. 91-889

In The

Supreme Court of the United States

October Term, 1991

FRANK McCOY, EDWARD ERDELATZ AND PIERRE MERLE,

Petitioners,

v.

THE HEARST CORPORATION, A CALIFORNIA CORPORATION, SAN FRANCISCO EXAMINER, RAUL RAMIREZ AND LOWELL BERGMAN,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California

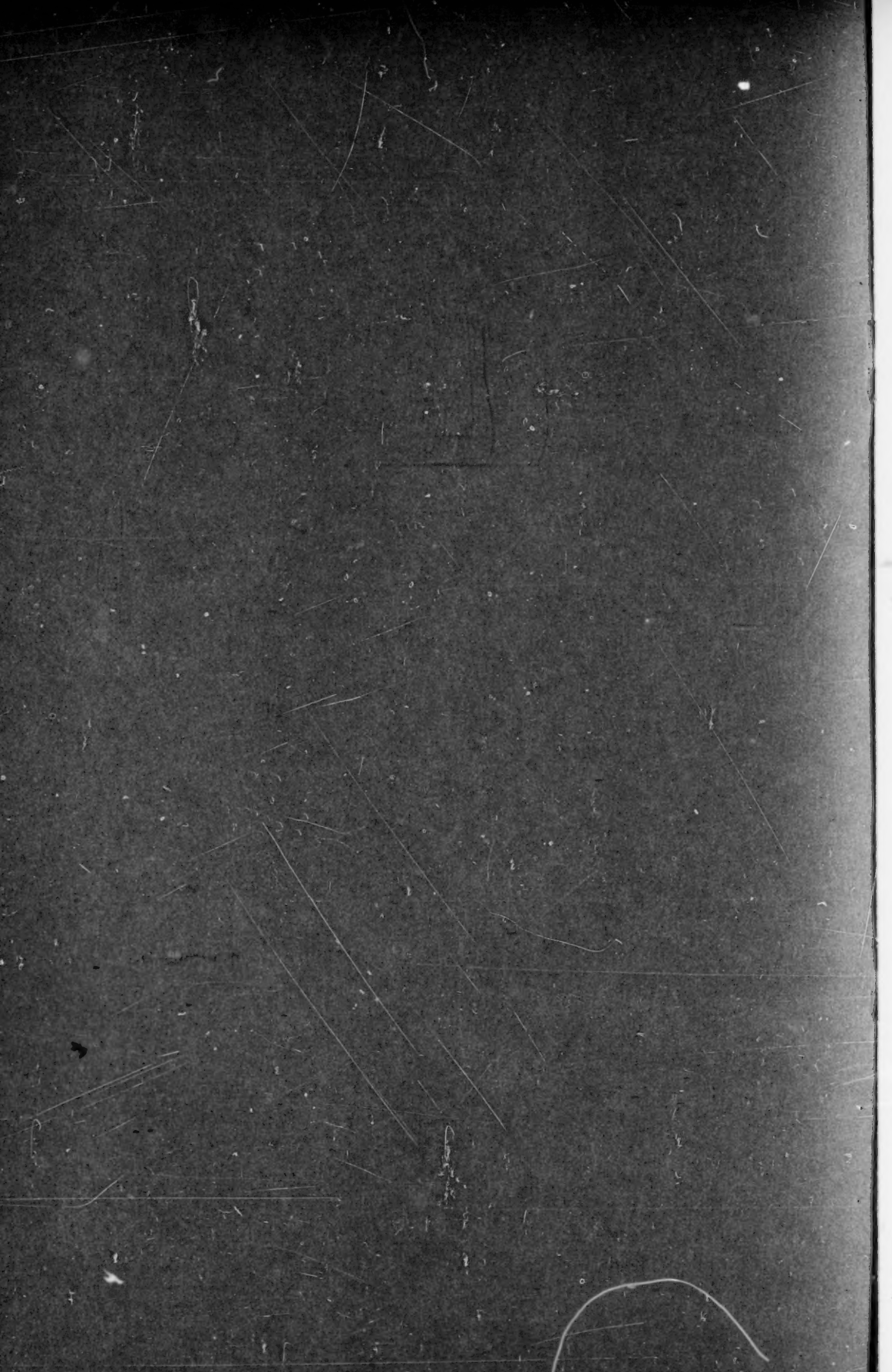
MEMORANDUM OPPOSING CERTIORARI

WALTER R. ALLAN
(Counsel of Record)
CRAIG E. STEWART
225 Bush Street
Post Office Box 7880
San Francisco, CA 94120-7880
Telephone: (415) 983-1000

Attorneys for Respondents The Hearst Corporation and San Francisco Examiner

PILLSBURY MADISON & SUTRO
Of Counsel

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831



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Petitioners,

v.

THE HEARST CORPORATION, A CALIFORNIA CORPORATION, SAN FRANCISCO EXAMINER, RAUL RAMIREZ AND LOWELL BERGMAN,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California

MEMORANDUM OPPOSING CERTIORARI[1]

The petition is frivolous. Petitioners assert that review is necessary because the California Supreme Court supposedly misapplied the standard of independent appellate review mandated by *New York Times v. Sullivan*, 376 U.S. 254 (1964), and *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984). However, the California

[1] The San Francisco Examiner is a division of The Hearst Corporation ("Hearst"). Hearst owns more than a 50% interest in Condé Nast and National Magazines Distributors, Ltd., Santa Eulalia Mining Company and Sonoma Mines Company.

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Supreme Court's opinion that contains this purported error was issued over five years ago, and petitioners have already unsuccessfully sought certiorari in this Court as to that ruling. *See McCoy v. Hearst Corp.*, 42 Cal.3d 835 (1986), *cert. denied*, 481 U.S. 1041 (1987).

The current petition is not from the California Supreme Court's ruling on the merits of petitioners' defamation claim, but from the state courts' refusal *to reopen* that ruling years after it became final. Petitioners seek review of the California court of appeal's one-sentence order denying a motion made by petitioners in 1991 to reinstate their defamation claim on the ground that the California Supreme Court's ruling in 1986 was erroneous. The court of appeal correctly denied that motion.[2]

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Hearst owns directly or indirectly a 50% or less interest in the following other privately held entities and ventures (the other owners of which may be traded publicly): Hearst/ABC Video Services, Hearst/ABC News Services, Hearst/ABC-NBC, Hearst/ABC-Viacom Entertainment Services, Lifetime Productions, Inc., ESPN, Inc., San Francisco Newspaper Printing Company, Inc., Ellipse International, Ellipse Programme, and New England Cable News Service.

[2] In a separate ruling, of which petitioners do not seek review, the California court of appeal also denied petitioners' independent attempt to reopen the case on the ground that the California Supreme Court's 1986 ruling entitled them to a new trial under a rule of state law announced in *Erlin v. National Union Fire Ins. Co.*, 7 Cal.2d 547 (1936). *See McCoy v. Hearst Corp.*, 227 Cal.App.3d 1657 (1991). The concurring opinion of Justice King upon which petitioners rely was from that ruling, not from the court of appeal's denial of petitioners' motion to recall the remittitur that is at issue here.

Petitioners have no right under either federal or state law to reopen a judgment after it has become final merely because they believe it was incorrectly decided or because they claim it violated their constitutional rights. Petitioners' remedy for any purported error in 1986 was to seek a writ of certiorari from this Court at that time. Petitioners sought such a writ, which the Court denied. There is no basis now for petitioners' second attempt to obtain review in this Court.

The petition for certiorari should be denied.

Dated: December 24, 1991.

Respectfully submitted,

WALTER R. ALLAN
(Counsel of Record)
CRAIG E. STEWART

Attorneys for Respondents
The Hearst Corporation and
San Francisco Examiner

PILLSBURY MADISON & SUTRO
Of Counsel